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1 July 2009

By E-Mail and Federal Express

California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, California 95670-6114

Attn: Victor J. Izzo
Senior Engineering Geologist
Title 27 Permitting and Mining
vizzo@waterboards.ca.gov

Subject: Wide Awake Mine

Dear Mr. Izzo:

I am submitting these comments and request for an evidentiary hearing, on behalf of Mr. and Mrs. Robert and Jill Leal, in response to your letter of 10 June 2009 and the draft cleanup and abatement order transmitted by that letter.

I assume that Mr. Pulupa is the prosecuting lawyer for the Regional Board on this matter. Please let me know which lawyer is advising the Board. If there are communications between the prosecuting and advising lawyers, I would like to be informed about them and participate.

Thank you for this opportunity to comment, and please call or e-mail me with any questions.

Sincerely,

Lawrence S. Bazel

cc: P. Pulupa (by e-mail and Federal Express)

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MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

COMMENTS ON DRAFT ORDER
AND REQUEST FOR EVIDENTIARY HEARING
SUBMITTED BY MR. AND MRS. ROBERT AND JILL LEAL

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1. INTRODUCTION

On June 11, 2009, staff of the California Regional Water Quality Control Board, Central Valley Region (the "Regional Board") e-mailed counsel for Mr. and Mrs. Robert and Jill Leal a revised draft, identified in a footer as "Rev 06-10-09", of a cleanup and abatement order for the Wide Awake Mine in Colusa County (the "Draft Order"). Mr. and Mrs. Robert and Jill Leal are named in that order, and are referred to as "Dischargers". (Draft Order at 1, unnumbered heading, and 2, ¶ 5.) Mr. and Mrs. Leal request that their names be removed from the order before it is issued in final.

Mr. and Mrs. Leal request an evidentiary hearing and the Constitutional protections of due process they are entitled to, as explained in sections 2 and 3 below.

Although Mr. and Mrs. Leal are identified in the Draft Order as a corporation, they are actually real living people, as explained in section 4.

Mrs. Leal should be removed from the order because she never owned the Site, as explained in section 5. She should also be removed for the same reasons that Mr. Leal should be removed.

Mr. Leal should be removed from the order for many reasons. In particular, he should be removed because Water Code § 13304 implements common-law principles of nuisance, and Mr. Leal is not liable under these principles, as explained in section 6. He is therefore not liable under § 13304, as explained in section 7. He should be removed from the order consistent with decisions of the State Water Resources Control Board ("State Board"), as explained in section 8, and should not be singled out for harsh treatment when other individuals are let go, as explained in section 9. If his is named he should be named as secondarily liable, as explained in section 10.

The Draft Letter appears to assume that the named parties are all "jointly" liable for any abatement work. But because they did not act together, there are only "severally" liable, meaning liable only for their share, as explained in section 11. Mr. Leal's share should be set at zero.

Water Code § 13304 allows the Regional Board, in some circumstances, to require dischargers to clean up *their* wastes. But Mr. Leal is not being order to clean up *his* waste; he is being ordered to clean up someone else's waste. The Draft Order therefore exceeds the Regional Board's authority under § 13304, as explained in section 12.

The Draft Order also cites Water Code § 13267 for authority, but Mr. Leal is not liable under § 13267, as explained in section 13.

The Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. Either way, Mr. Leal is being unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The Regional Board is therefore "taking" Mr. Leal's property (i.e. his money) in violation of the Constitution, as explained in section 14. The Regional Board should reimburse him for any costs incurred.

2. THE REGIONAL BOARD MUST PROVIDE DUE PROCESS AND AN EVIDENTIARY HEARING

The issuance of a cleanup and abatement order is a quasi-judicial action, and due process applies:

> In considering the applicability of due process principles, we must distinguish between actions that are legislative in character and actions that are adjudicatory. In the case of an administrative agency, the terms "quasi-legislative" and "quasi-judicial" are used to denote these differing types of action. . . .quasi-judicial acts involve the determination and application of facts peculiar to an individual case. Quasi-legislative acts are not subject to procedural due process requirements while those requirements apply to quasi-judicial acts regardless of the guise they may take. . . . .

(*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal. App. 4th 1160, 1188, citations omitted.) In *Beck Development*, the Department of Toxic Substances Control attempted "to restrict the use of Beck's property based upon facts peculiar to that property", which, the court concluded, was "unquestionably quasi-judicial in nature and must comport with requirements of due process." Here the determination of facts related to whether Mr. and Mrs. Leal are responsible for an alleged nuisance is unquestionably quasi-judicial.[1]

Because the issuance of the Draft Order is quasi-judicial, the provisions of 23 CCR § 648 et seq. apply. Consistent with these provisions, Mr. and Mrs. Leal request a formal evidentiary hearing and an opportunity to cross-examine witnesses.

They also request an opportunity to consider and respond to any evidence or argument submitted by Regional Board staff in response to these comments.

3. THE REGIONAL BOARD HAS THE BURDEN OF PROOF

Regional Board staff sometimes respond to evidence offered by private parties by saying that they are not convinced. In the *Beck Development* case, DTSC "insisted that Beck had failed to convince it that the property is nonhazardous." (*Beck Development*, 44 Cal.App.4th at 1206.) Here, it will not be enough for Regional Board staff to say that they are not convinced, because they have the burden of proof. They must submit sufficient evidence to prove that the Regional Board has authority to order Mr. and Mrs. Leal to conduct the cleanup and abatement activities required by the order.

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[1] Chief Counsel for the State Board has confirmed that cleanup and abatement orders are adjudicative. (Memo from M. Lauffer, Chief Counsel, State Water Resources Control Board (August 2, 2006), attached as Exhibit 1 at 2.)

4. MR. AND MRS. LEAL ARE PEOPLE, NOT CORPORATIONS

The Draft Order asserts that "The parties listed in Attachment B . . . are known landowners . . . of the Mine site". (Draft Order at 2, ¶ 5.) Attachment B incorrectly lists "Robert and Jill Leal" as "Owner", for specified intervals, of Parcels 3, 9, 11, and 12. In the last column of Attachment B, which asks whether the owner is a "State Registered Corporation", the answers given are "Yes—current agent" for Parcel 3, "Yes" for Parcel 9, and "Yes—active" for Parcels 11 and 12. These answers are all wrong, because Mr. and Mrs. Leal are not a corporation. They are individual people.

5. MRS. LEAL NEVER OWNED ANY INTEREST IN THE PROPERTY

A person "cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control." (*Preston v. Goldman* (1986) 42 Cal. 3d 108, 119, quoting *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134.) Mrs. Leal does not own, possess, or control any of the property at issue, and never has. She therefore cannot be held liable for any condition on that property, and her name should be removed from the Draft Order.

Numbering of the parcels involving the "Wide Awake Mercury Mine Property" has changed over the years. According to Attachment B to the Draft Order, the mine property was originally part of assessor parcel number 018-200-003-000 ("Parcel 3").[2] In May 1993 Parcel 3 was split into smaller parcels, and parcel 018-200-009-000 ("Parcel 9") became what Attachment B refers to as the "Mine Property" (the "Site"). In 1995 Parcel 9 was split into three smaller parcels, 018-200-010-000 ("Parcel 10"), 018-200-011-000 ("Parcel 11"), and 018-200-012-000 ("Parcel 12"). A figure showing Parcels 10, 11, and 12 (i.e. the Site) is attached as Exhibit 2.

Attachment B incorrectly lists "Robert and Jill Leal" as "Owner", for specified intervals, of Parcels 3, 9, 11, and 12. Mrs. Leal never owned any interest in any of the parcels. Attached as Exhibit 3 is the deed by which Mr. Leal received his interest in part of Parcel 3. As you can see, the interest was granted to "ROBERT LEAL, a married man, as his sole and separate property". As a matter of law, when a man obtains property as his "separate" property, he alone owns the property, and his wife does not own any part of it. (Cal. Family Code § 752 ("[e]xcept as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other"); *Huber v. Huber* (1946) 27 Cal.2d 784, 791 ("[r]eal property purchased with the separate funds of the husband is his separate property").)

The Regional Board's files contain no deed showing any conveyance of any interest in the Site to Mrs. Leal. Mr. Leal never conveyed any part of the Site to Mrs. Leal. (Declaration of Jill Leal, attached as Exhibit 4, ¶ 2; Declaration of Robert Leal, attached as Exhibit 5, ¶ 2.) At no time did anyone convey any interest in the Site to Mrs. Leal. (Ex. 4, ¶ 2.) Mrs. Leal never owned any interest of any nature in the Site. Mrs. Leal, therefore, never had any ownership interest in the Site. Nor did she operate the Site or conduct operations of any nature on the Site. (*Id.*)

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[2] But see footnote 4 below.

The Draft Order is therefore wrong when it asserts that "[a]ll of the parties named in this order either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operated the mine, thus facilitating the discharge of mining waste into waters of the state." (Draft Order at 2, ¶ 5.) Mrs. Leal neither owned the Site nor operated it.

Regional Board staff may have been misled by the deeds *from* Mrs. Leal to Mr. Leal. The Regional Board files include three deeds of this type, and they are attached as Exhibits 6, 7, and 8. These deeds were issued not because Mrs. Leal actually had any interest to transfer to Mr. Leal, but because title companies demand these deeds when a married man sells his property. (Declaration of Richard J. Wallace, attached as Exhibit 9, ¶¶ 4-6.) Title companies believe that deeds of this type protect them against the hypothetical possibility that the wife might have an interest that might not be transferred when the husband sells. They reason that *if* the wife has an interest, the deed will transfer it to the husband, who will then transfer it as part of the sale; and if the wife does not have an interest, she cannot object to signing a deed that gives away nothing. That is what happened here. (Ex. 4, ¶ 3; Ex. 5, ¶ 3.) .) In each case, the deed transferred nothing, because Mrs. Leal had never obtained any interest in any of the parcels from Mr. Leal or anyone else. (Ex 4, ¶ 2.)

In short, Mrs. Leal should be taken off the order because she never owned or operated the Site.

Mrs. Leal should also be taken off the order for the reasons her husband's name should be taken off, as described in sections 6-14 below.[3]

6. MR. LEAL IS NOT APPROPRIATELY NAMED IN THE ORDER BECAUSE HE IS NOT LIABLE UNDER THE COMMON LAW OF NUISANCE

In 2004, the California Court of Appeal concluded that Water Code § 13304 "must be construed 'in light of common law principles bearing upon the same subject'—here the subject of public nuisance". (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38, quoting *Leslie Salt Co. v. San Francisco Bay Conservation And Development Commission* (1984) 153 Cal. App. 3d 605, 619.) In *Leslie Salt*, the court "emphasized" that the act it was construing "represents the exercise by government of the traditional power to regulate public nuisances":

> It needs to be emphasized at this point that the [act] is the sort of environmental legislation that represents the exercise by government of the traditional power to regulate public nuisances. Such legislation constitutes but a sensitizing of and refinement of nuisance law. Where, as here, such legislation does not expressly purport to depart from or alter the common law, it will be

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[3] As explained in her declaration, Mrs. Leal lacks any knowledge about mining, mercury, and their consequences. Nothing put her on notice that the Site might be causing a nuisance. (Ex. 4, ¶¶ 4-9.)

> construed in light of common law principles bearing upon the same subject.

(*Leslie Salt* at 618-619, citations and quotation marks omitted.) Now that *City of Modesto* has established that § 13304 "must be construed in light of common law principles bearing upon . . . public nuisance", the Regional Board must consider these common-law principles. (*See City of Modesto* at 38, quotation marks omitted.) To the extent that decisions of the State Board are contrary to these common-law principles (see section 8 below), the State Board decisions are no longer good law.

Common-law principles establish that Mr. Leal is not liable for the nuisance identified in the Draft Order. The following sections explain that former landowners are generally not liable for dangerous conditions on the property, and that the exception for continuing public nuisances does not apply to Mr. Leal.

A. Former Landowners Are Generally Not Liable For Dangerous Conditions On The Land

In the *Goldman* case, the California Supreme Court concluded that former owners are generally not liable for dangerous conditions on property they no longer own, even if the danger was created by their own negligence:

> Should former owners, allegedly negligent in constructing an improvement on their property, be subject to liability for injuries sustained on that property long after they have relinquished all ownership and control? The Restatement Second of Torts proposes that *liability is terminated upon termination of ownership and control* except under specified exceptions, and we agree.

(*Preston v. Goldman* (1986) 42 Cal. 3d 108, 110, emphasis added.) After a full review of the Restatement and case law, the Supreme Court concluded that it "should not depart from the existing rules restricting liability of predecessor landowners." (*Id.* at 125.)

Here, Mr. Leal is a former part-owner of the Site.[4] Under the *Preston* rule, he is no longer liable for conditions on the property unless an exception applies.

The only exception that may be relevant here is found in Civil Code § 3483, which provides that "Every successive owner of property who *neglects* to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it." (Civil Code § 3483, emphasis added.) The following

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[4] The Site, as referred to in the Draft Order, consists of Parcels 10, 11, and 12. (See section 5 above.) The deed with which Mr. Leal obtained his interest did not include what are now Parcels 11 and 12. (Ex. 9, ¶ 3.) There is no other evidence that Mr. Leal ever owned what is now Parcels 11 and 12. He therefore is not responsible for any discharges or activities related to that portion of the Site.

sections explain why Mr. Leal is not liable under this section. First, he did not receive notice of the nuisance, which is required for liability. Second, the alleged nuisance did not come into being until after Mr. Leal sold the property. Third, even assuming that there was a continuing nuisance, he did not "neglect" to abate it. Fourth, any mercury discharged during the early 1990s cannot be causing the alleged nuisance.

B. Mr. Leal Is Not Liable Because He Did Not Receive Notice Of The Nuisance

The California Supreme Court decided long ago that a person may not be held liable for a continuing nuisance without notice of the nuisance:

> The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made, that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection. This rule . . . is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant.

(*Grigsby v. Clear Lake Water Works Co.* (1870) 40 Cal. 396, 407.) As discussed in section 8 below, State Board decisions have recognized that a person cannot be held liable without notice. Here, Mr. Leal did not receive notice "that it is a nuisance".

Mr. Leal is a farmer. (Ex. 5, ¶ 4.) He has never studied mining, and has no knowledge about mining issues. He does not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. (*Id.*)

Mr. Leal did not know that there was a former mine on the Site when he purchased his interest in the property. (*Id.*, ¶ 5.) He purchased a larger area of property (the "Property"), of which the Site was a relatively small portion, for investment purposes. He learned about the Property from Tom Nevis, who controlled Goshute Corporation. Mr. Nevis had arranged to purchase the property from Wells Fargo Bank, but needed money to complete to transaction. Mr. Leal provided that money, and in return received a half interest in the Property. The other half interest went to NBC Leasing, another corporation controlled by Mr. Nevis.

Mr. Leal never operated any of the Property, but rather leased it out to the Harter Land Company, which used it for grazing. (*Id.*, ¶ 6.)

Mr. Leal did not learn that there was a former mine on the Site until he was trying to sell his part interest to the U.S. Bureau of Land Management. (*Id.*, ¶ 7.) After Mr. Leal found out about the former mine, he went to look for it. He had assumed that it was a gold mine, and did not understand that it was a mercury mine. He was taken to the Site by Roy Whiteaker, who was the real estate broker trying to sell the Site, and who owns Cal Sierra Properties, which eventually bought the Site to use for hunting. During that visit, Mr. Leal never saw anything that looked like a mine. All he saw was a remnant of a brick structure. He did not see any piles of rock or other materials. He did not, and still does not, know what "tailings" are. Grass had grown over the area, and there was not much to see. He did not see anything that seemed like it

might contain mercury. He did not, and still would not, know what mercury looked like even if he saw it. Other that that one visit, he has never been to the Site. (*Id.*, ¶ 8.)

During the time Mr. Leal partly owned the Site he did not know that mercury might be leaving the Site. He did not know that anything on the Site might be causing a nuisance. No one ever informed him, during the time of his part ownership, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. He had absolutely no idea that he should be doing anything on the Site to protect public health or the environment. (*Id.*, ¶ 9.)

The condition of the Site, therefore, did not put Mr. Leal on notice of any nuisance, and no one informed him that there might be a nuisance.[5]

C. There Is No Evidence That The Site Was Causing A Nuisance In The Early 1990s—Or That It Is Causing A Nuisance Now

The nuisance alleged in the Draft Order is not the kind that could have been observed by Mr. Leal, or by anyone else, during the time he partly owned the Site. The Draft Order provides no evidence that the Site was causing a nuisance in the early 1990s—there is no evidence, in fact, that it is causing a nuisance *now*.

The Regional Board did not establish numerical criteria for mercury in Sulphur Creek until 2007. (Resolution No. R5-2007-0021.)[6] That resolution established two standards, one for low-flow conditions (1,800 ng/L of total mercury), and one for high-flow conditions (ratio of mercury to total suspended solids not to exceed 35 mg/kg). (*Id.*, Attachment 1 at 2.)

The Draft Order does not mention either of these criteria. The only reasonable conclusion is that there is no evidence that either of these criteria is being exceeded.

Instead, the Draft Order identifies four "limits" that are imported from agencies other than the Regional Board. (Draft Order at 5, ¶ 26.) The Draft Order asserts that these "numerical limits for [methylmercury, total mercury, and inorganic mercury] implement the Basin Plan objectives for mercury and methylmercury in Sulphur Creek." This statement is plainly incorrect, because the real Basin Plan objectives have no relationship to these four "limits". Worse still, the four "limits" plainly *do not apply* to Sulphur Creek.

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[5] Regional Board staff may be tempted argue that Mr. Leal is liable, even though he did not receive notice during the time of his ownership, because he has received notice *now*. But Mr. Leal does not *now* own any interest in the Site. If he is to be held liable for a nuisance resulting from his part ownership of the Site, he must have received notice while he was part owner. Anything else would violate *Grigsby*, which explained that notice is required because "it would be a great hardship to hold a party responsible for consequences of which he may be ignorant". (*Grigsby*, 40 Cal. at 407.)

[6] Resolution available at http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/resolutions/r5-2007-0021.pdf

These limits are intended to protect supplies of *drinking water* and the human consumption of fish.[7] But the Regional Board has made clear that natural conditions in Sulphur Creek preclude the use of the creek for drinking-water supply or fish consumption:

> Studies have been completed evaluating the attainability of the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms, which concluded that these beneficial uses are not existing and cannot be attained in Sulphur Creek from Schoolhouse Canyon to the mouth due to natural sources of dissolved solids and mercury.

(Resolution R5-2007-0021 at 1, ¶ 8.)

The table in ¶ 26 should therefore be removed from the Draft Order. It imposes only requirements designed to protect drinking water and fish consumption, but Sulphur Creek is not used for drinking water or fish consumption. Nor is it protected for these uses, because natural conditions prevent their attainment.

So what *is* the nuisance being alleged in the Draft Order? Note that the former mine itself is not alleged to be causing a nuisance. It has apparently been sealed. The only concern identified in the Draft Order is the erosion of material from piles of mining wastes into Sulphur Creek. (*Id.* at 3-4, ¶¶ 14-20.) The Draft Order identifies, in particular, about 20,000 cubic yards of "tailings" and up to 8,000 cubic yards of "waste rock" at the Site.

According to the Draft Order, mercury eroded from the Site causes Sulfur Creek to exceed its water-quality objectives. The named parties have "caused or permitted waste to be discharged", and this waste has affected Sulphur Creek by "exceeding applicable" water-quality objectives, thereby creating "a condition of pollution or nuisance". (Draft Order at 6, ¶ 32.) The exceeded water-quality objectives, however, are those four numbers, discussed above, that cannot apply to Sulphur Creek. So this argument is plainly wrong.

Although the Draft Order argues that the four numbers in the table "implement the narrative objectives", the Draft Order never asserts that discharges from the Site cause violations of the narrative objectives themselves. (*See* Draft Order at 5, ¶ 26.) The relevant narrative objective, as it exists now, species that "All waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life." (Basin Plan[8] at III-8.01.) This narrative criterion does not require that Sulphur

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[7] The first "limit" in the table is identified as "a drinking water standard". The second is for "fish tissue". The third is for "human health protection", which considers exposure through both drinking water and fish consumption. The fourth is a "public health goal", which applies to drinking water. Public health goals are goals, not enforceable limits.

[8] The Water Quality Control Plan (Basin Plan) For The California Regional Water Quality Control Board Central Valley Region, Fourth Edition, Revised October 2007 (with Approved Amendments), The Sacramento River Basin And The San Joaquin River Basin (http://www.swrcb.ca.gov/rwqcb5/water_issues/basin_plans/sacsjr.pdf)

Creek be maintained free of all toxic substances, which of course would be impossible, but only free of toxic substances that are present "in concentrations that produce detrimental physiological responses". The Draft Order does not identify any "detrimental physiological responses", and does not assert that the Site causes any detrimental physiological responses in Sulphur Creek.

The reason, no doubt, is that Regional Board staff do not have evidence to prove a causal connection between *particulate* mercury from the mines, which is a relatively minor concern, and *methylmercury* in fish, which might produce the "detrimental physiological response" required for a violation of the narrative criterion. Any connection between the two would depend on complicated reactions that vary from site to site:

> Historic mining activities in the Cache Creek watershed have discharged and continue to discharge large volumes of inorganic mercury (termed total mercury) to creeks in the watershed. . . . .
>
> Total mercury in the creeks is converted to methylmercury by bacteria in the sediment. The concentration of methylmercury in fish tissue is directly related to the concentration of methylmercury in the water. The concentration of methylmercury in the water column is controlled in part by the concentration of total mercury in the sediment and the rate at which the total mercury is converted to methylmercury. The rate at which total mercury is converted to methylmercury is variable from site to site, with some sites (i.e., wetlands and marshes) having greatly enhanced rates of methylation.

(*Id.* at IV-33.04.) In Sulphur Creek fish do not appear to be present, and people do not drink the water. As a result, there does not appear to be anything that would demonstrate a "detrimental physiological response".

It is also difficult to blame the mines for the mercury in Sulphur Creek, because most of the mercury in the water comes from natural hot springs:

> Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter . . . .
>
> . . . dissolved mercury comprises as much as 90 percent of the total mercury in Sulphur Creek. Dissolved mercury appears to be released by the active hydrothermal system, whereas particulate-bound mercury . . . comes from sediments and mercury-bearing mine waste mobilized into the creek during storms.

(Draft Order at 3-4, ¶¶ 19-20.) With so much mercury coming from natural sources, and because there appears to be nothing in the creek that might suffer a "detrimental physiological response", Regional Board staff cannot demonstrate that discharges from the Site cause the narrative

criterion to be violated. They cannot demonstrate a causal connection now, and they certainly cannot demonstrate a causal connection from the early 1990s, when there were no data.[9]

The Draft Order also asserts that "[m]ine waste at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fish, and hunting) or work at the site." (Draft Order at 4, ¶ 21.) But there is no evidence that the public uses the Site for hiking, camping, and hunting, which of course would be a trespass on private property. The Regional Board can safely assume that no one uses the Site for fishing, because there is no water on the Site. It is also a distance from Sulphur Creek, which in any case does not appear to maintain sport fish. Without considerable public use, there cannot be a *public* nuisance, as that term is used in the Civil Code, because a public nuisance "affects at the same time an entire community or neighborhood, or any considerable number of persons". (Civil Code § 3480.) The Water Code uses this same language to define "nuisance". (Water Code § 13050(m), (m)(2).) There must, in short, be evidence of considerable public use of the Site to establish an onsite nuisance that would be subject to a cleanup and abatement order. There is certainly no evidence of any public use of the Site in the early 1990s, and it therefore cannot have created an onsite nuisance then.

D. Mr. Leal Did Not "Neglect" To Abate A Continuing Nuisance

As noted in section 6.A above, Civil Code § 3483 holds a successor landowner who *neglects* to abate a continuing nuisance liable for that nuisance. The word "neglect" carries a connotation that the person was negligent or otherwise at fault. (*See Delaney v. Baker* (1999) 20 Cal. 4th 23, 34 (statute defines nursing-home neglect as a "negligent failure").) Here there is no evidence of any negligence or fault by Mr. Leal.

Mr. Leal never conducted any mining operations, or any other operations, on the Site. He leased the property out to someone who used it for grazing. Mr. Leal did not know the former mine existed until he tried to sell the Site. When he visited the Site he saw nothing to suggest that the Site was causing any sort of problem. No one ever notified him that the Site could be causing a nuisance. (Ex. 5, ¶ 9.)

In 2003, CalFed published a study on mercury loading from former mines in the area, and on measures needed to abate the loading. (CalFed Cache Creek Study, Task 5C2 (September 2003)[10].) The report concluded that an interim action was *not* needed: "Mitigation of mercury loading using an interim action is not warranted due to the anticipated small load reduction." (*Id.* at 9-32.) If interim action was not appropriate even in 2003, when sufficient data had been

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9 If the Site were so clearly causing a nuisance in 1995, then why didn't Regional Board staff put Mr. Leal on notice of the nuisance? By 1995, the Regional Board was working with a Cache Creek group, in a collaborative process, to determine "water quality goals" for mercury, understand "transport and fate of mercury", and "identify and evaluate source releases". (Webpage describing Delta Tributaries Mercury Council, attached as Exhibit 10, at 1-2.)

10 Report available at http://mercury.mlml.calstate.edu/wp-content/uploads/2008/12/finalrpt-task-5c2-final-scmd-eeca-sept-2003.pdf

collected to evaluate the issue, Mr. Leal can hardly have been at fault for not instituting interim action before any of the data were collected.

Because Mr. Leal did not "neglect" to abate a continuing nuisance during his ownership, he cannot be held liable now.

E. Any Mercury Discharged In The Early 1990s Is Long Gone

Mr. Leal can only be held liable for mercury discharged during the time of his partial ownership:

> Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others.

(*Martinez v. Pac. Bell* (1990) 225 Cal. App. 3d 1557, 1565.) Here there is no evidence that any mercury that left the Site in the early 1990s still remains in Sulphur Creek. The mercury present comes from the intervening acts of others, and Mr. Leal cannot be held liable for it.

The Draft Order explains that the named parties were chosen because they "either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operate the mine, thus facilitating the discharge of mining waste into waters of the state." (Draft Order at 2, ¶ 5.) The discharge at issue takes place when stormwater carries mining waste into the creek:

> The Mine waste rock and tailings are susceptible to erosion from uncontrolled stormwater runoff. Surface water runoff transports mercury-laden sediment to a tributary to Sulphur Creek . . . . The estimate mercury [load] from this Mine is 0.02 to 0.44 kg/yr or 2.4% of the total mine related mercury [load] of 4.4 to 18.6 kg/yr to Sulphur Creek.

(*Id.*, ¶ 17.) Note that this percentage is only for "mine related mercury". Background loadings may be as high as 57 kilograms per year, which more than three times as much as all the mines in the area put together—according to the CalFed study from which the Draft Order takes it figures. (CalFed, Task 5C2, Table 3-9, page 2, attached as Ex. 11.) If background loadings were added in, the Site loading would be only about 0.6% of the entire mercury load to Sulphur Creek.

And all these numbers are small compared to the San Francisco Bay, which receives about 1,220 kilograms per year of mercury, of which 440 kilograms per year come from the

Central Valley. (Total Maximum Daily Load (TMDL) Proposed Basin Plan Amendment and Staff Report (2004) at 34, excerpt attached as Exhibit 12.[11])

Any waste discharge attributable to Mr. Leal would have taken place not less than 14 years ago, when he sold the Site. And where is that waste now? There is no reason to believe that the waste is still in Sulphur Creek, and nothing in the Draft Order suggests otherwise.

Only erodible waste—i.e. material small enough to be picked up by rainwater running off the property—could have been discharged to Sulphur Creek during the time Mr. Leal partly owned the Site. If it was not erodible, it would not have been discharged. Erodible material, by its nature, is carried downstream by storms. Mining wastes generated within the last 160 years (i.e. since 1849) are now moving through San Francisco Bay and out the Golden Gate. (*Id.*) Because 160 miles may be used as a rough upper estimate of the distance these wastes have traveled, it would be fair to conclude that these wastes have been moving at a rate of at least one mile per year. Up in the mountains, when the slopes are steeper, a better estimate would be several miles per year.

Wastes from Wide Awake Mine enter Sulphur Creek roughly one mile above the point where it flows into Bear Creek. (Sulphur Creek TMDL For Mercury, Final Staff Report (2007), Figs. 1.2 and 1.3, attached as Ex. 13.) If mines wastes in the area are moving several miles a year, then any wastes discharged 14 years ago would have long ago been flushed out of Sulphur Creek. As a result, there is no reason to believe that any mercury discharged from the Site during the time that Mr. Leal partly owned it still remains in the creek.

In short, there is no evidence that any mercury discharged from the Site before 1995, when Mr. Leal party owned it, remains in Sulphur Creek. If mercury discharged before 1995 is no longer in the creek, it cannot be causing a problem in the creek. The alleged nuisance is limited to conditions in the creek. Therefore, there is no evidence that any mercury that might be attributable to Mr. Leal is causing the alleged nuisance.

In summary, Mr. Leal should be removed from the Draft Order because § 13304 was intended to implement the common law of nuisance, and Mr. Leal is not liable under the common law of nuisance. Former landowners are generally not liable, and the exception for owners who neglect to abate a continuing nuisance does not apply because Mr. Leal did not receive notice, because there was no neglect, and because there is no evidence that any discharges from the Site from the early 1990s are causing the alleged nuisance.

7. MR. LEAL IS NOT SUBJECT TO WATER CODE § 13304

The Draft Order cites Water Code § 13304 for the authority to issue a cleanup and abatement order. (Draft Order at 1, introductory paragraph, and at 6, ¶ 33.) But Mr. Leal is not subject to § 13304, which applies to people who have "caused or permitted" waste to be discharged or deposited:

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[11] Full report available at http://www.swrcb.ca.gov/rwqcb2/board_info/agendas/2004/september/09-15-04-10_appendix_c.pdf.

> Any person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste . . . .

(Water Code § 13304(a).) Mr. Leal is not subject to § 13304 because he did not cause or permit waste to be discharged.

As noted in section 6.A above, § 13304 "must be construed" consistent with "common law principles bearing upon . . . public nuisance". (*City of Modesto Redevelopment Agency*, 119 Cal.App.4th at 38.) The phrase "caused or permitted" can easily be construed consistent with common law. Those who "caused" the nuisance are those who were its actual cause-in-fact. Those who "permitted" the nuisance are those who neglect to abate it as required by Civil Code § 3483. (See section 6.D above.) To be liable as someone who "permitted" the discharge under § 13304, therefore, the person must have (1) received notice of the nuisance, and (2) neglected to act through negligence or other fault. (*Id.*)

The phrase "caused or permitted" cannot be given a broader meaning without violating the U.S. Constitution. In the *Heitzman* case, the California Supreme Court considered whether the phrase "causes or permits", as used in a statute prohibiting elder abuse, met "constitutional standards of certainty". (*People v. Heitzman* (1994) 9 Cal. 4th 189, 193.) The Supreme Court concluded that "the broad statutory language at issue here fails to provide fair notice" and that that prohibition on *permitting* elder abuse "would be unconstitutionally vague absent some judicial construction clarifying its uncertainties." (*Id.*)

Here § 13304 would not provide fair notice, and therefore would be unconstitutionally vague, if it were applied to past owners of property who had no notice during their ownership that their properties were causing a nuisance. If, however, § 13304 is interpreted consistent with common-law principles of public nuisance, then there is no constitutional infirmity.

Because Mr. Leal is not liable for the alleged nuisance under common-law principles, he is not a person whom § 13304 identifies as having "caused or permitted".

8. MR. LEAL IS NOT LIABLE UNDER STATE BOARD DECISIONS

Wenwest is the leading State Board decision on when former landowners may be held liable under § 13304. (*Petitions of Wenwest, Inc.*, Order No. WQ 92-13 (1992) 1992 Cal. ENV LEXIS 19.) *Wenwest* identified a three-part rule applicable to former owners:

> . . . we apply a three-part test to former owners: (1) did they have a significant ownership interest in the property at the time of the discharge?; (2) did they have knowledge of the activities which resulted in the discharge?; and (3) did they have the legal ability to prevent the discharge?

(*Id.* at *5.) When a former owner "passes" all three parts of the test, it is held liable.

Here Mr. Leal cannot pass the test because he cannot satisfy the second part. He did not have knowledge of the activities that resulted in the discharge. Because he did not receive notice, he is not liable under the common law. (See section 6 above.) He is also not liable under State Board precedent.

The *Wenwest* decision did not stop there, however. It considered the situation of Wendy's, who had owned the property for a short time but had not contributed to the contamination, and concluded that it was not appropriate to hold Wendy's liable:

> No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. . . . .
>
> In this case, the gasoline was already in the ground water and the tanks had been closed prior to the brief time Wendy's owned the site. They were told about the pollution problem . . . They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

(*Id.* at *6-7.) The State Board did not set out a clear test for exonerating Wendy's. Its conclusion depended "on a number of considerations", and list of nine items was presented, not all of which weighed in Wendy's favor. Two key factors emphasized Wendy's innocence:

> * Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)
>
> * Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.

(*Id.* at *7-8.) Wendy's had some knowledge of the contamination, but the State Board did not find the knowledge sufficient blameworthy to require liability:

> * While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.
>
> * Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.

(*Id.* at *8.) Two other factors suggest equitable reasons for leniency:

* Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.

* Wendy's owned the site for a very brief time.

(*Id.* at *7.) The final three factors seem to relate to the convenience of the State Board:

* The franchisee who bought the property from Wendy's is on the order.

* There are several other responsible parties who are properly named in the order.

* The cleanup is proceeding.

(*Id.* at *7-8.)[12] Note that one factor *not* included in the list is whether Wendy's continued discharging during its ownership. The State Board long ago decided that the natural movement of groundwater through the soil is a discharge. Wendy's therefore continued to "discharge", as the State Board has construed that term.

When these factors are applied to Mr. Leal, he should be found not liable. Once again, the key factor is his factual innocence. He had nothing to do with the activity that is causing the nuisance. Unlike Wendy's however, he had no knowledge that there might be a problem. He knows nothing about mining, did not purchase the property with the intent to obtain any benefit from the mine, and never owned any mineral rights at the Site. The seller and purchasers are on the order, and there are sufficient other parties to expect that the abatement will proceed without him.

In addition, Mr. Leal had received a memo prepared by Charles W. Whitcomb, the District Geologist of the U.S. Bureau of Land Management. (Attached as Exhibit 14.) Mr. Whitcomb, who clearly was an impartial expert in these matters, examined the Site and concluded that Site risks were not significant:

> The danger of there being large amounts of hazardous mercury at this site is probably minor. The waste rock from the mine and furnace on the mine dump would contain *little or no mercury.*

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[12] These last three factors appear to depend not on the duty or fault of the party, but on the convenience of the regulatory agency, and therefore appear inappropriate for the determination of liability. (*See People v. Heitzman*, 9 Cal. 4th at 206 ("whether or not the lack of statutory clarity has opened the door to arbitrary or discriminatory enforcement of the law" is part of inquiry into constitutionality of statute), 207 ("under the statute as broadly construed, officers and prosecutors might well be free to take their guidance not from any legislative mandate embodied in the statute, but rather, from their own notions").)

(Ex. 14, at 2, emphasis added.) Mr. Leal, who knows nothing about mining or the environmental consequences of mercury, can hardly be faulted for not taking action when an expert from the federal government inspected the Site and found nothing that would require action.

Mr. Leal should therefore be removed from the Draft Order.

9. MR. LEAL SHOULD NOT BE SINGLED OUT FOR HARSH TREATMENT

It is not fair to name Mr. Leal while letting others go. Tom Nevis, who sold him the Site and held the other half-interest in it, is not named in the Draft Order. Nor are his corporations, Goshute and NBC Leasing. Roy Whiteaker, who bought Mr. Leal's interest in the Site through Cal Sierra Properties, is also not named. If these individuals, who are no less responsible than Mr. Leal for any problem caused by the Site, are not sufficiently liable to be named, then neither is Mr. Leal.

The Draft Order does not even name the Ralph M. Parsons Company, which now does business as Parsons and is "an engineering and construction firm with revenues exceeding $3.4 billion in 2008". (http://www.parsons.com/about/default.asp.) Regional Board files include an assignment to Parsons of a lease dated January 28, 1965 and signed by Ms. Gibson and Ms. Trebilcott. This lease appears to refer to the Site, or to the mineral rights for the Site. Parsons would have understood, far better than Mr. Leal, about mercury at the Site.

For reasons of equity, therefore, Mr. Leal should not be named in the Draft Order.

10. IF MR. LEAL IS NAMED, HE SHOULD BE NAMED AS SECONDARILY LIABLE

In *Wenwest* the State Board concluded that Wenwest and the current owner of the property, Susan Rose, should be secondarily liable. It explained that secondary liability puts "the landowner is a position where it would have no obligations under the order unless and until the other parties defaulted on [theirs]." (*Id.* at *9.) In *Wenwest* the State Board concluded that Susan Rose and Wenwest should be secondarily liable because "While she is the current landowner, it is clear that she neither caused nor permitted the activity which led to the discharge", and because "Wenwest had nothing to do with the activity which caused the discharge". (*Id.* at *9-10.)

Here Mr. Leal had nothing to do with the mining activities that caused the discharge. If he is named, he should be secondarily liable.[13]

11. IF MR. LEAL IS LIABLE, HE IS SEVERALLY LIABLE

When several persons, acting independently, cause harm, each is "individually and separately liable for his proportionate share of the damage". (*Slater v. Pacific American Oil Co.* (1931) 212 Cal. 648, 655.) The concept that individuals are liable only for their share of the

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[13] This argument is made in the alternative, without waiving any other argument.

harm is known as "several" liability, as opposed to "joint" liability, in which any individual may be required to pay for all the damage caused.

Here Mr. Leal's proportionate share is zero, because there is no evidence that any mercury that entered the creek in the early 1990s still is there.

Here any obligation to abate a nuisance would arise from a party's understanding of the potential for nuisance. The only parties who would have understood the potential for nuisance are those who understood mercury mining, which would have been the mineral-rights owners and lessees, and the government: Homestake Mining, the Trebilcot Trust, Parsons, and the U.S. Bureau of Land Management.

12. THE DRAFT ORDER EXCEEDS THE AUTHORITY OF § 13304

Even assuming that Mr. Leal is liable, § 13304 limits what he can be ordered to do. Under § 13304, a person who has caused or permitted "waste to be discharged" can be ordered to "clean up *the waste* or abate *the effects of the waste* . . ." (Water Code § 13304(a), emphasis added.) Here Mr. Leal allegedly discharged mercury from the Site during the early 1990s. But the Draft Order does not order him to clean up *that* waste, nor does it order him to abate the effects of *that* waste. That waste, as explained above, is long gone. Instead, it requires him to *prevent additional waste* from being discharged from the property. (Draft Order at 9-10, ¶¶ 9-14 (requiring remediation of onsite wastes).) Mr. Leal is plainly not liable for waste that has not yet been discharged, and the Draft Order therefore exceeds the authority provided by § 13304.

To be sure, § 13304 also holds liable persons who caused or permitted "any waste to be . . . *deposited* where it is, or probably will be, discharged into the waters of the state". (Water Code § 13304(a), emphasis added.) But Mr. Leal did not deposit the tailings piles or waste rock at the Site. They were there when he bought it. Regional Board staff may argue that Mr. Leal "permitted" waste to be "deposited" when rain carried erodible material from the piles into drainage ditches at the Site. But this reading would threaten the constitutionality of § 13304, as described in section 7 above. In any case, there is no evidence of any deposits made into any ditches on the Site during the early 1990s. Any erodible materials that were carried into the drainage ditches in before 1995 would have been carried into the creek soon afterwards, and are long gone. (See section 6.E above.) As a result, there is no evidence that during the time that Mr. Leal partly owned the site there were any deposits of waste that is now, "or probably will be, discharged into the waters of the state". (Water Code § 13304(a).)[14]

Nor is there any evidence that discharges from the Site in the early 1990s caused groundwater contamination. Because groundwater in this area is so naturally high in mercury,

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[14] The Regional Board recognizes that it does not have sufficient evidence to require abatement of instream sediments. The Basin Plan concludes that "further assessments are needed", and notes that "Responsible Parties that could be required to conduct feasibility studies include the U.S. Bureau of Land Management (USBLM), State Lands Commission (SLC)[;] California Department of Fish and Game (CDFG); Yolo, Lake, and Colusa Counties, mine owners, and private landowners." (Basin Plan at IV-33.08.)

there is no reason to believe that any surface activity could have any significant effect. The Draft Order does not specifically refer to groundwater contamination. It argues, however, that "water-rock interaction likely mobilizes mercury based on detection of mercury in a WET leachate sample from waste rock . . . (CalFed Report)." (Draft Order at 3, ¶ 16.) But the CalFed report does not support this argument. On the contrary, it reaches the opposite conclusion and exonerates the Site from any concerns related to leachate:

> Mine waste at Wide Awake Mine was not found to leach mercury at a concentration [above regulatory requirements]; therefore, the waste is considered a Group C mine waste. A Group C mine waste does not require control of the generation and migration of leachate to surface water and groundwater. Therefore, implementation of the final mitigation action at Wide Awake Mine does not require control [of] generation and migration of leachate to the tributary to Sulphur Creek.

(CalFed Cache Creek Study, Task 5C2, at 9-32.) Note that this conclusion—that leachate levels are too low to be of concern—eliminates not only the question of groundwater contamination, but also the question of whether leachate from the mine wastes are contaminating Sulphur Creek.

The Draft Order exceeds the authority of § 13304 by ordering Mr. Leal to abate onsite waste when there is no evidence that he is responsible for any onsite waste that is being discharged or may be discharged to Sulphur Creek.

13. MR. LEAL IS NOT LIABLE UNDER § 13267

The Draft Order also cites as authority Water Code § 13267. (Draft Order at 1, unnumbered introductory paragraph, and at 7, ¶¶ 37-38.) This section authorizes the Regional Board to demand "technical or monitoring program reports":

> . . . the regional board may require that any person who has discharged . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires.

(Water Code § 13267(b)(1).) This section, however, goes on to limit the Regional Board's authority to those reports whose burden bears a reasonable relationship to the benefits:

> The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

(*Id.*) The section also limits the Regional Board's authority by imposing conditions. The Regional Board must provide a written explanation and identify the evidence "requiring that person to provide the reports":

> In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the

> reports, and shall identify the evidence that supports requiring that person to provide the reports.

(*Id.*) Here the Draft Order makes only the most minimal attempt to satisfy these requirements. Here is the Draft Order's showing, in full:

> The technical reports required by this Order are necessary to ensure compliance with this Cleanup and Abatement Order, and to ensure the protection of the waters of the state. The Dischargers either own, have owned, operated, or have operated the mining site subject to this Order.

(Draft Order at 7, ¶ 38.) This showing is insufficient to impose the Draft Order's requirements on Mr. Leal.

To begin with, the Draft Order requires much more than technical reports. It requires actual cleanup and abatement. (Draft Order at 9-10, ¶¶ 9-14.) Nothing in § 13267 requires a former discharger to clean up and abate mining waste.

In any case, the Draft Order exceeds the authority of § 13267 because it imposes requirements on Mr. Leal unrelated to any discharge he may be responsible for. It should be obvious that § 13267 authorizes the Regional Board to require persons who have discharged to submit reports *related to their discharges*. The Regional Board can hardly contend that because Mr. Leal may have discharged in Colusa County he is therefore required to provide technical reports related to someone else's discharge in, for example, San Diego County. The Draft Order requests only reports related to existing conditions at the Site and at any water-supply wells within a half mile of the Site (of which there may be none). (Draft Order at 8-9, ¶¶ 2-8.) Because the reports are related only to existing conditions at the Site, not to any discharges that may have occurred during the early 1990s, § 13267 does not provide authority to require Mr. Leal to provide them.

The principal need for the requested reports, according to the Draft Order, is that they "are necessary to ensure compliance with this Cleanup and Abatement Order". (Draft Order at 7, ¶ 38.) In other words, the reports are necessary to support the abatement actions ordered under the authority of § 13304. But Mr. Leal is not subject to § 13304, and he should therefore not be subject to any reports requires in support of that section. (See section 7 above.) The burden on Mr. Leal greatly outweighs the benefit.

The remainder of the Draft Order's explanation does not satisfy the requirements of § 13267. In particular, it does not identify "the evidence that supports requiring that person to provide the reports". The Draft Order identifies only the status of the named persons as owners, operators, or former owners or operators. That is not enough. At the very least, the Draft Order should explain why someone who may have been associated with the property long ago should be required to provide information, unrelated to that ownership, now.

14. THE DRAFT ORDER IS A "TAKING" IN VIOLATION OF THE CONSTITUTION

The United States Constitution requires a public agency pay compensation when it "takes" private property for public use:

> "compensation is required only if considerations . . . suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (*Yee v. Escondido* (1992) 502 U.S. 519, 522-523.)

(*Arcadia Development Company v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 265, parallel citation omitted.)

Here the Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. More generally, it is part of a response to a problem caused by a combination of natural conditions and acts that took place, throughout large parts of the Central Valley, in the nineteenth century. As a result, the Draft Order unfairly singles out Mr. Leal, a former part owner of property who did nothing on the property and certainly never caused any problem, and requires him to pay costs that should properly be borne by the public as a whole. The Regional Board should therefore reimburse Mr. Leal for any costs he incurs as a result of the Draft Order and any final order.

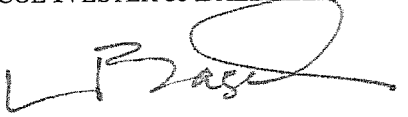
15. CONCLUSION

Mrs. Jill Leal should be removed from the order because she never owned the property, and also for the reasons that Mr. Robert Leal should be removed.

Mr. Leal should be removed because he is not liable under common-law principles of nuisance (section 6); he is therefore not liable under § 13304 (section 7); removal is consistent with State Board decisions (section 8); he should not be singled out for harsh treatment (section 9); if named he should be only secondarily liable (section 10); he is only severally liable, and only for a share of zero (section 11); the Draft Order exceeds the authority of the Regional Board (section 12); he is not liable under § 13267 (section 13), and issuing the order would be a "taking" in violation of the Constitution (section 14).

Dated: July 1, 2009

BRISCOE IVESTER & BAZEL LLP



By: _____

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Exhibit 1

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Arnold Schwarzenegger
Governor

TO: [via e-mail and U.S. Mail]
Board Members
STATE WATER RESOURCES CONTROL BOARD AND
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS

FROM: Michael A.M. Lauffer
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: August 2, 2006

SUBJECT: SUMMARY OF REGULATIONS GOVERNING ADJUDICATIVE PROCEEDINGS BEFORE THE CALIFORNIA WATER BOARDS

This memorandum outlines and reinforces some of the primary requirements that apply when the State Water Resources Control Board (State Water Board) and the nine California Regional Water Quality Control Boards conduct adjudicative proceedings. Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons. Adjudicative proceedings include, but are not limited to, enforcement actions and permit issuance.

Background

The California Water Boards perform a variety of functions. The boards set broad policy consistent with the laws passed by Congress and the Legislature. The boards also routinely determine the rights and duties of individual dischargers or even a class of dischargers. In this regard, the boards perform a judicial function. The judicial function manifests itself when the boards adopt permits and conditional waivers or take enforcement actions.

Different rules apply depending on the type of action pending before a water board. One of the distinctions between the two types of proceedings is the prohibition against ex parte communications. A prohibition on ex parte communications only applies to adjudicative proceedings.[1] Besides the ex parte communications prohibition, additional rules, procedures, and participant rights adhere in adjudicative proceedings. This memorandum outlines some of the more important procedural mechanisms associated with adjudicative proceedings.

[1] The Office of Chief Counsel addressed ex parte communications in a July 25, 2006 memorandum and questions and answers document.

Adjudicative Proceedings

What is an adjudicative proceeding?
Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons. Generally, this includes permitting and enforcement actions, but does not include planning and general regulatory functions such as Basin Plan amendments and Total Maximum Daily Loads.

Below is a partial list of common water board actions that are of an adjudicative nature:

- National Pollutant Discharge Elimination System (NPDES) permits;
- Waste discharge requirements (WDRs);
- Water right permits and requests for reconsideration;
- Orders conditionally waiving waste discharge requirements;
- Administrative civil liability (ACL) orders;
- Cease and desist orders;
- Cleanup and abatement orders;
- Water quality certification orders (401 certification);
- Permit revocations.

What laws govern adjudicative proceedings?
Adjudicative proceedings are governed by Chapter 4.5 of the Administrative Procedure Act[2] and by regulations adopted by the State Water Board[3]. By regulation, the State Water Board has chosen not to apply several sections of the Administrative Procedure Act to the California Water Boards' proceedings. These sections are Language Assistance, Emergency Decisions, Declaratory Decision, and Code of Ethics. All other sections and provisions of Administrative Procedure Act Chapter 4.5 apply.

Who are the parties to an adjudicative proceeding?
Parties to an adjudicative proceeding are any person or persons to whom a water board's action is directed as well as any other person or persons that the board chooses to designate as a party. In some cases, certain members of a water board's staff will be a party to an adjudicative proceeding. If some water board staff are designated as a party, other staff will be assigned to advise the board members. Anyone who is not a party, but who participates in the proceedings (other than staff advisers to the water board), is considered an interested person. The process for deciding who is a party is left to the discretion of a water board. A hearing may be held on the issue or the chair may be delegated to make such determinations. When a party is designated, the chair should provide notice in advance of the hearing to the water board staff and the discharger.

What is a formal hearing?
Most of the time an adjudicative proceeding will be a formal hearing in which a water board requires parties to follow a pre-determined process that may include such procedural issues as

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[2] Gov. Code, § 11400 et seq.

[3] Cal. Code Regs., tit. 23, §§ 648-648.8.

submittal of the names of witnesses, qualifications of experts, exhibits, proposed testimony, and legal argument. A hearing notice will be drafted spelling out the requirements and the timeframes. The terms and conditions of the notice are left to the discretion of the water board conducting the proceeding, though it is suggested that some level of formality is useful in preserving decorum and fostering efficiency. A hearing under Chapter 4.5 of the Administrative Procedure Act and the State Water Board's regulations is considered a "formal hearing," even if it does not have some attributes of hearing formality, unless it is officially designated as an "informal hearing" under Government Code section 11445.20 and California Code of Regulations, title 23, section 648.7.

The order of proceedings is within the discretion of a water board as well. However, the regulations suggest a specific order and should generally be followed unless the facts and circumstances of a particular case indicate otherwise. Normally, the proceedings begin with an opening statement by the chair followed by the administration of the oath to those indicating that they intend to participate. Then the parties make their presentations through testimony and the introduction of exhibits. Typically, witnesses may be cross-examined by other parties but the timing of such cross-examination is within the discretion of the regional board. If the re-direct examination has been specified in the notice, re-direct examination follows cross-examination. A water board should decide in advance how it would like to handle questions from board members. Interruptions and questions by board members should not count against time allotted to a party. At some point during the proceeding, comments from interested persons must be admitted. Thereafter, the regulations anticipate a closing statement from each party.

What are the rules of evidence in an adjudicative proceeding?
The rules of evidence are not those that apply in the courtroom. Any relevant evidence will be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, no matter what the statutory or customary rule may be. Hearsay evidence is admissible, but only for the purpose of supplementing or explaining other evidence. If an objection is raised that certain testimony constitutes hearsay evidence, the chair should note for the record that the evidence will be admitted but that it cannot, by itself, support a finding. If no other evidence is introduced in support of that finding, a water board must ignore the hearsay evidence and decline to make such a finding.

A water board may accept evidence by taking official notice of certain things such as laws, court decisions, regulations, and facts and propositions that are common knowledge or not in reasonable dispute.

What are informal hearings?
Informal hearings may be used in place of formal hearings in some instances, if a water board thinks it advisable. Generally, this process can be used where significant facts are not in issue and the proceeding held is to determine only what consequences flow from those facts. In deciding whether to use the informal process, a water board should consider how many parties are involved, whether any of the parties have requested a more formal process, how many interested persons there are, how complex the issues facing the water board may be, and how important a formal record may be if petitions and appeals result. If any party objects to the informality of the process, a water board or its chair must address and resolve the objections before proceeding.

Because of the flexibility the regulations provide for formal hearings, a water board may find it advisable to conduct its hearings as formal hearings with streamlined procedures, as opposed to conducting an informal hearing. The regulations provide that a water board may waive any of the regulatory requirements that are not required by a statute. While this is certainly within the prerogative of a water board, caution should be exercised before any such waiver. These regulations generally seek to preserve the fairness of the process and omission of any of these provisions may result in unnecessary disputes over procedural issues.

How can the chair control the conduct of the adjudicative proceeding?
A water board need not tolerate disruption of an adjudicative proceeding. The Administrative Procedure Act and State Water Board regulations provide that a water board may cite for contempt any person who defies a lawful order, refuses to take an oath, obstructs or interrupts a meeting by disorderly conduct or breach of the peace, violates the ex parte communication rules, or refuses to comply with a subpoena or similar order of a water board. No immediate action can be taken, but the matter may be referred to the local Superior Court for action, including sanctions and attorneys fees.

cc: [All via e-mail only]

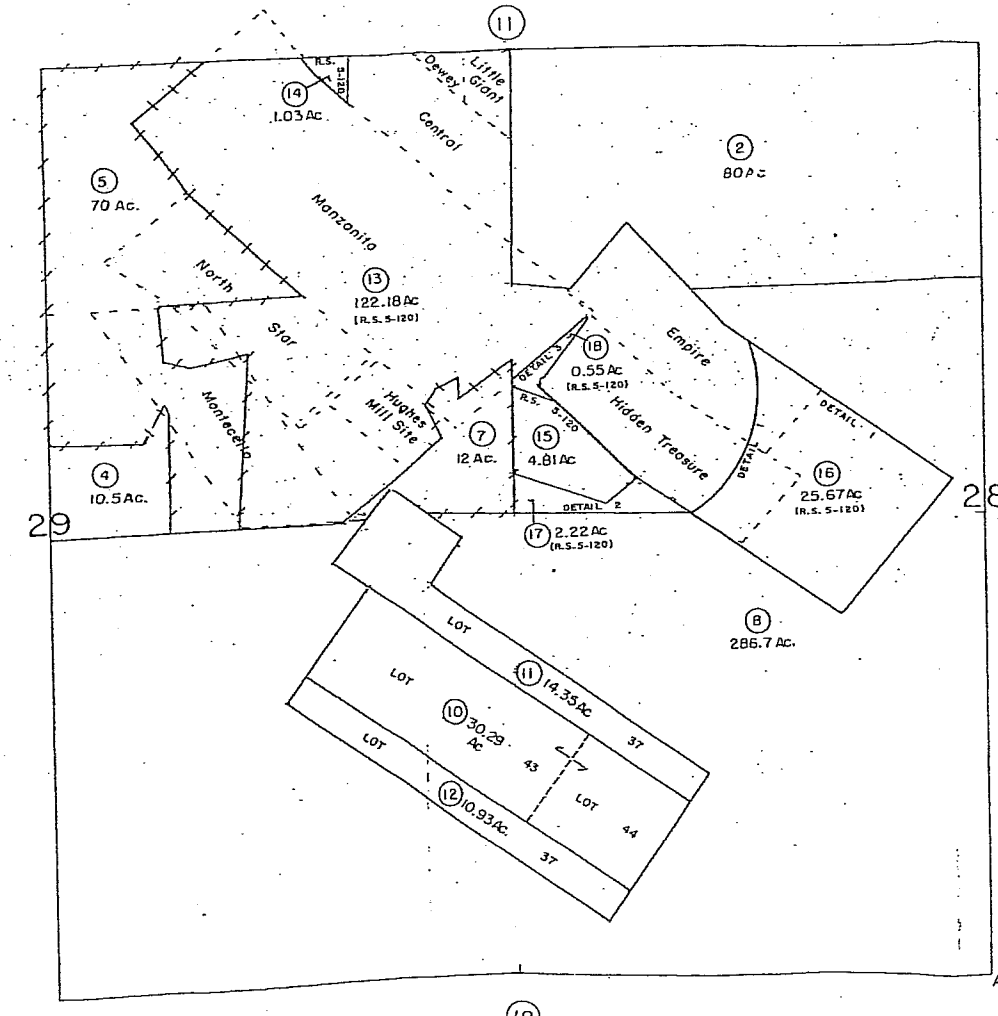
Celeste Cantú, EXEC
Tom Howard, EXEC
Beth Jines, EXEC
All Division Deputy Directors
All Executive Officers
Regional Water Boards
All Assistant Executive Officers
Regional Water Boards, Branch Offices
All Office of Chief Counsel attorneys

Exhibit 2

SULPHUR CREEK MINING DIST. T. 14 N, R. 5 W, M.D.B.& M.

Tax Area Code 71-1

18-20



Assessor's Map Bk. 18 Pg. 20
County of Colusa, Calif.
1999

Patents Bk. K Pg. 303, 408
R.S. BK. 5, PG. 120

NOTE – Assessor's Block Numbers Shown in Ellipses
Assessor's Parcel Numbers Shown in Circles

Exhibit 3

COLUSA COUNTY

831

Recording Requested By

When Recorded Mail To

Robert Leal
Post Office Box 580
Roseville, CA 95661-0580

Order No.

This Form Furnished courtesy of
Colonial Title Guaranty Company

RECORDED AT REQUEST OF
Colonial Title Guaranty Co.
— MIN. PAST 9 a.m.
OFFICIAL RECORDS COLUSA COUNTY, CALIF.

FEB 28 1990

Kathleen Moran
Recorder, Colusa Coun.

p $7.00

BOOK 649 PAGE 118

Space above this line for Recorder's use

CORPORATION GRANT DEED

Documentary Transfer Tax Due $110.55
☐ Based on Full Consideration.
☒ Based on Transferred Equity.
By: COLONIAL TITLE GUARANTY

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

GOSHUTE CORPORATION

a corporation organized under the laws of the State of California, does hereby GRANT to

ROBERT LEAL, a married man, as his sole and separate property

the real property in the unincorporated area of the County of Colusa State of California, described as:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

IN WITNESS WHEREOF, said corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its _____ President and _____ Secretary thereunto duly authorized.

Dated: February 21, 1990 (seal)

GOSHUTE CORPORATION

By _____ President

By _____ Secretary

STATE OF CALIFORNIA
COUNTY OF Sutter ss.

On February 22, 1990 before me, the undersigned, a Notary Public in and for said State, personally appeared

Melvin G. Epley

known to me to be the _____ President, and

_____

known to me to be the _____ Secretary of the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Yolanda G Reyes

OFFICIAL SEAL
YOLANDA G. REYES
NOTARY PUBLIC - CALIFORNIA
SUTTER COUNTY
My Commission Expires Mar. 1, 1991

Mail tax statements to return address above

All that certain real property situate in the County of Colusa, State of California, described as follows:

Lot 3, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Fractional Section 3, the Whole of Fractional Section 4, Lots 1, 2, 3, 4 and the south half of the Northeast quarter of Fractional Section 5, Lots 2, 3 and4 of Fractional Section 18 and Lot 1 in Fractional Section 19, Twonship 13 North, Range 5 West, M.D.B. & M.

Lots 3, 4, 5, 6, 8, 9, 10 and the Southwest quarter of the Northeast quarter, the West half of the Southeast quarter and the southeast quarter of the Southwest quarter of Section 28, Lots 2, 3, 4, 5, 12, 13 and 14, and the Southwest quarter of the Southeast quarter of Section 29, the "Wide Awake Quick Silver Lode Mining Claim" represented by Lots 43 and 44 in Sections 28 and 29, Lots 2 and 7, the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Fractional Section 31, Lots 2, 5, 6, 7, 8, 9, 11 and 12, the Northeast quarter of the Northeast quarter, and the Northeast quarter of the Southeast quarter of Section 32, the Whole of Section 33, and the Southwest qurater of Section 34, Township 14 North, Range 5 West, M.D.B. & M.

ESCEPTING THEREFROM that portin described in Deed from Emma G. Trebilcot to the State of California recorded February 1, 1980, Book 486 Official Records, page 346.

ALSO EXCEPTING THEREFROM any portion thereof lying within the County of Lake.

ALSO EXCEPTING THEREFROM all oil, gas, minerals and other hydrcarbons and geothermal rights, together with the right of ingress and egress to obtain and remove same as reserved in that certain Deed from Wells Fargo Bank, N.A., as Trustee for the Emma G. Trebilcot Trust to Goshute Corporation, a California corporation, dated December 5, 1989 and recorded February 28, 1990 as Recorder's Serial No. 828.

Exhibit 4

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

Declaration of Jill Leal

I, Jill Leal, declare:

1. I am a person named in the Draft Cleanup and Abatement Order revised as of June 10, 2009 (the "Draft Order"). My business address is 950 Tharp Road, Suite 201, Yuba City, California 95993.

2. During the early 1990s, my husband Robert Leal owned a half interest in property identified by Attachment B to the Draft Order as the former Wide Awake Mine (the "Site"). He never at any time conveyed any interest in the Site to me. At no time did anyone convey to me

any interest in the Site. I never owned any interest of any nature in the Site. I never operated the Site or conducted any operations of any nature on the Site.

3. As part of the sale of his interest in the parcels that make up the Site, the title company insisted that I sign deeds conveying any interest I might have in the Site to my husband, even though I did not have any interest. I understood these deeds to be a formality that title companies insist on.

4. I am a housewife. I have never studied mining, and I have no knowledge about mining issues. I do not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. I never studied, and am not an expert in, chemistry, biochemistry, or toxicology.

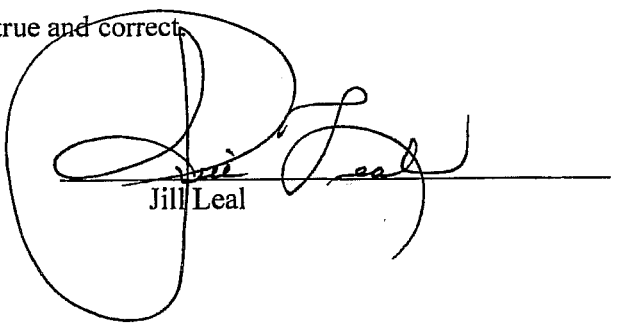
5. I did not know that there was a former mine on the Site when my husband purchased his interest in it. I did not learn that there was a former mine on the Site until after my husband tried to sell part of the Property to the U.S. Bureau of Land Management.

8. I accompanied my husband when he was taken to the Site by Roy Whiteaker. I went for the ride and to be with my husband. The scenery was beautiful. Other that that one visit, I have never been to the Site.

9. During the time my husband partly owned the Site I did not know that mercury might be leaving the Site. I did not know that anything on the Site might be causing a nuisance. No one ever informed me, during that time, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. I had absolutely no idea that we should be doing anything on the Site to protect public health or the environment.

I hereby declare under penalty of perjury under the laws of the State of California that the statements made in this declaration are true and correct.

Dated: June 30, 2009



Jill Leal

Exhibit 5

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

Declaration of Robert Leal

I, Robert Leal, declare:

1. I am a person named in the Draft Cleanup and Abatement Order revised as of June 10, 2009 (the "Draft Order"). My business address is 950 Tharp Road, Suite 201, Yuba City, California 95993.

2. During the early 1990s, I owned a half interest in property identified by Attachment B to the Draft Order as the former Wide Awake Mine (the "Site"). I never at any time conveyed any interest in the Site to my wife, Jill Leal.

3. As part of the sale of my interest in the parcels that make up the Site, the title company insisted that my wife sign deeds conveying any interest she might have in the Site to me, even though she did not have any interest. I understood these deeds to be a formality that title companies insist on.

4. I am a farmer. I have never studied mining, and I have no knowledge about mining issues. I do not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. I never studied, and am not an expert in, chemistry, biochemistry, or toxicology.

5. I did not know that there was a former mine on the Site when I purchased my interest in it. I purchased a larger area of property (the "Property"), of which the Site was a relatively small portion, for investment purposes. I learned about the Property from Tom Nevis, who controlled Goshute Corporation. Mr. Nevis had arranged to purchase the property from Wells Fargo Bank, but needed money to complete to transaction. I provided that money, and in return received a half interest in the Property. The other half interest went to NBC Leasing, another corporation controlled by Mr. Nevis.

6. I never conducted any operations on the Property. I leased it out to the Harter Land Company, which used it for grazing.

7. I did not learn that there was a former mine on the Site until I tried to sell part of the Property to the U.S. Bureau of Land Management. The Bureau provided me with an evaluation by their geologist dated November 6, 1992, which I understand will be submitted to the Regional Board as part of my comments.

8. After I found out about the former mine, I went to look for it. I had assumed that it was a gold mine, and did not understand that it was a mercury mine. I was taken there by

Roy Whiteaker, who was the real estate broker trying to sell the Site, and who owns Cal Sierra Properties, which eventually bought the Site to use for hunting. We never saw anything that looked like a mine. All we saw was a remnant of a brick structure. I did not see any piles of rock or other materials. I did not, and still do not, know what "tailings" are. Grass had grown over the area, and there was not much to see. I did not see anything that seemed like it might contain mercury. I did not, and still would not, know what mercury looked like even if I saw it. Other that that one visit, I have never been to the Site.

9. During the time I partly owned the Site I did not know that mercury might be leaving the Site. I did not know that anything on the Site might be causing a nuisance. No one ever informed me, during the time of my part ownership, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. I had absolutely no idea that I should be doing anything on the Site to protect public health or the environment.

I hereby declare under penalty of perjury under the laws of the State of California that the statements made in this declaration are true and correct.

Dated: June 30, 2009

Robert Leal

COLUSA COUNTY

1278

RECORDING REQUESTED BY
COLONIAL TITLE GUARANTY COMPANY

AND WHEN RECORDED MAIL TO

Name North State Title Company
Street Address 809 Plumas Street
City & State Yuba City, CA 95991

MAIL TAX STATEMENTS TO

Name Robert Leal
Street Address P. O. Box 580
City & State Roseville, CA 95661-0580

RECORDED AT REQUEST OF
Colonial Title Guaranty Co.
39 MIN. PAST 8 a.m.
OFFICIAL RECORDS COLUSA COUNTY, CALIF.
OCT 10 1991
Kathleen Moore
$ 8.00 Recorder, Colusa County
BOOK 697 PAGE 138

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Individual Quitclaim Deed

CAT. NO. NN00580 TO 1922 CA (2-80)

THIS FORM FURNISHED BY TICOR TITLE INSURERS

ALL | PTN.

The undersigned grantor(s) declare(s):
Documentary transfer tax is $ Zero
( ) computed on full value of property conveyed, or
( ) computed on full value less value of liens and encumbrances remaining at time of sale.
(x) Unincorporated area: ( ) City of _____, and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
JILL LEAL, wife of the Grantee named herein

hereby REMISES, RELEASES AND QUITCLAIMS to
ROBERT LEAL, a married man, as his sole and separate property

the following described real property in the unincorporated area
County of Colusa, State of California:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

APN 18-200-03
18-210-06
18-190-03&04
21-010-01&04

Dated: April 15, 1991

Jill Leal

STATE OF CALIFORNIA
COUNTY OF Sutter } ss.

On April 15, 1991 before me, the undersigned, a Notary Public in and for said State, personally appeared Jill Leal

personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.
WITNESS my hand and official seal.

Signature Yolanda G Reyes

OFFICIAL SEAL
YOLANDA G. REYES
NOTARY PUBLIC-CALIFORNIA
SUTTER COUNTY
My Commission Expires Mar. 13, 1995

BOOK 0697 PAGE 138

(This area for official notarial seal)

COLUSA COUNTY

EXHIBIT "A"

Order No. 76797 -A

SCHEDULE C

The land referred to in this policy is situated in the State of California, County of Colusa and is described as follows:

AS TO AN UNDIVIDED 1/2 INTEREST IN AND TO THE FOLLOWING DESCRIBED REAL PROPERTY:
Lot 3, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Fractional Section 3, the Whole of Fractional Section 4, Lots 1, 2, 3, 4 and the South half of the Northeast quarter of Fractional Section 5, Lots2, 3 and 4 of Fractional Section 18 and Lot 1 in Fractional Section 19, Township 13 North, Range 5 West M.D.B. & M.

Lots 3, 4, 5, 6, 8, 9, 10 and the Southwest quarter of the Northeast quarter, the West half of the Southeast quarter and the Southeast quarter of the Southwest quarter of Section 28, Lots 2, 3, 4, 5, 12, 13 and 14, and the Southwest quarter of the Southeast quarter of Section 29, the "Wide Awake Quick Silver Lode Mining Claim" represented by Lots 43 and 44 in Sections 28 and 29, Lots 2 and 3, the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Fractional Section 31, Lots 2, 5, 6, 7, 8, 9, 11 and 12, the Northeast quarter of the Northeast quarter, and the Northeast quarter of the Southeast quarter of Section 32, the Whole of Section 33, and the Southwest quarter of Section 34, Township 14 North, Range 5 West, M.D.B. & M..

EXCEPTING THEREFROM that portion described in Deed from Emma G. Trebilcot to the State of California recorded February 1, 1980, Book 484 Official Records, page 346.

Exhibit 7

Order No
Escrow No 509817-DR
Title No. 47777

WHEN RECORDED MAIL TO

Robert Leal
P. O. Box 580
Roseville, Ca. 95678

2979

RECORDED AT REQUEST OF
Western Title Colusa County
30 MIN. PAST 2 p.m.
OFFICIAL RECORDS COLUSA COUNTY, CALIF.

MAY 20 1993

Kathleen Moran

$ 18.00 Recorder, Colusa County

BOOK 738 PAGE 825

SPACE ABOVE THIS LINE FOR RECORDER'S USE

MAIL TAX STATEMENTS TO

DOCUMENTARY TRANSFER TAX $ -0-

Computed on the consideration or value of property conveyed, OR
Computed on the consideration or value less liens or encumbrances remaining at time of sale

X is exempt from imposition of the Documentary Transfer Tax pursuant to Revenue and Taxation Code § 11927(a), on transferring community quasi-community or quasi-marital property assets between spouses, pursuant to a judgment, an order, or a written agreement between spouses in contemplation of any such judgment or order

The Undersigned Grantor Declares

Signature of declaring grantor or grantee

INTERSPOUSAL TRANSFER GRANT DEED

(Excluded from reappraisal under California Constitution Article 13 A § 1 et seq.)

This is an interspousal transfer and not a change in ownership under § 63 of the Revenue and Taxation Code and Grantor(s) has (have) checked the applicable exclusion from reappraisal

- A transfer to a trustee for the beneficial use of a spouse, or the surviving spouse of a deceased transferor, or by a trustee of such a trust to the spouse of the trustor
- [ ] A transfer to a spouse or former spouse in connection with a property settlement agreement or decree of dissolution of a marriage or legal separation, or
- [X] A creation, transfer, or termination, solely between spouses, of any co-owner's interest
- [ ] The distribution of a legal entity's property to a spouse or former spouse in exchange for the interest of such spouse in the legal entity in connection with a property settlement agreement or a decree of dissolution of a marriage or legal separation
- [ ] Other

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

JILL LEAL, wife of the herein grantee

hereby GRANT(S) to

ROBERT LEAL, a married man, as his sole and separate property

the real property in the ~~County~~ (Unincorporated Area) , County of Colusa
State of California, described as

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF COMPRISING ONE PAGE

"THE GRANTOR IS EXECUTING THIS INSTRUMENT FOR THE PURPOSE OF RELINQUISHING ALL OF GRANTORS RIGHTS, TITLE AND INTEREST INCLUDING, BUT NOT LIMITED TO, ANY COMMUNITY PROPERTY INTEREST IN AND TO THE LAND DESCRIBED HEREIN AND PLACE TITLE IN THE NAME OF THE GRANTEE AS HIS/HER SOLE AND SEPARATE PROPERTY. GRANTOR'S INITIALS _____."

Dated April 5, 1993

Jill Leal

STATE OF CALIFORNIA
COUNTY OF
On
Before me the undersigned, a Notary Public in and the said State, personally appeared

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same

WITNESS my hand and official seal

Signature

(This area for official notarial seal)

BOOK 738 PAGE 827

MAIL TAX STATEMENTS AS DIRECTED ABOVE

FD-13C

EXHIBIT "A"

T 14N., R5W., MDM;
SECTION 28: Lots 3-6 inclusive, SW1/4NE1/4, SE1/4SW1/4, W1/2SE1/4.
SECTION 29: Lots 2-5 inclusive, SW1/4SE1/4.
SECTION 32: Lots 2,5,6,7,8,11,12,NE1/4NE1/4,NE1/4SE1/4.
SECTION 33: All
SECTION 34: SW1/4

EXCEPTING THEREFROM that portion described in Deed from Emma G. Trebilcot to the State of California, recorded February 1, 1960, Book 484 Official Records, page 346.

EXCEPTING THEREFROM any portion thereof lying within Lake County.

ALSO EXCEPTING THEREFROM all oil, gas, minerals and other hydrocarbons, etc.as reserved in Deed from Wells Fargo Bank N.A., as Trustee of the Emma G. Trebilcot Trust to Goshute Corporation , recorded February 28, 1990, Book 649, Official Records, page 109.

State of California } SS.

County of SUTTER

On 4/15/93 before me, LESLYE ROSSITER
Notary Public, personally appeared JILL LEAL
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature Leslye Rossiter (Seal)

OFFICIAL SEAL
LESLYE ROSSITER
NOTARY PUBLIC-CALIFORNIA
SUTTER COUNTY
My Commission Expires Sept 21, 1994

FD-1 (Revised 11/92)

2279

Exhibit 8

RECORDING REQUESTED BY

NORTH STATE TITLE COMPANY

AND WHEN RECORDED MAIL THIS DEED AND UNLESS OTHERWISE SHOWN BELOW, MAIL TAX STATEMENTS TO:

Robert Leal

P. O. Box H
Yuba City, CA 95992

Title No. 50114te
Escrow No. 164132

95 003865

RECORDED AT REQUEST OF
WESTERN TITLE COLUSA COUNTY

47 min. past 10 am
Official Records Colusa County, CA
OCT 16 1995
KATHLEEN MORAN - COUNTY RECORDER

No. of Pages 2 Fee $ 10.00 p

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

A.P.N. ptn: 18-20-003

The Undersigned grantor(s) declare(s):
Documentary transfer tax is $0.00
(x) computed on full value of property conveyed, or
( ) computed on full value less value of liens and encumbrances remaining at time of sale.
(x) Unincorporated area: ( ) City of , and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
Jill Leal, wife of the grantee named herein

hereby GRANT(S) to
Robert Leal, a married man, as his sole and separate property

the following described real property in the Unincorporated Area , County of Colusa , State of California:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF FOR LEGAL DESCRIPTION
It is the intent of the grantor herein to relinquish any interest, community or otherwise, in and to the herein described property, and to vest title in the name of the grantee as his/her sole and separate property.

Dated: September 29, 1995

Jill Leal

STATE OF CALIFORNIA
COUNTY OF Sutter } SS.
On September 29, 1995 before me, the undersigned, a Notary Public in and for said State, personally appeared Jill Leal

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature
Pamela Brockman

PAMELA BROCKMAN
COMM. #1050017
NOTARY PUBLIC - CALIFORNIA
SUTTER COUNTY
Comm. Expires JAN 30, 1999

MAIL TAX STATEMENTS TO PARTY SHOWN ON FOLLOWING LINE; IF NO PARTY IS SHOWN, MAIL AS DIRECTED ABOVE

Robert Leal	P. O. Box 3509	Yuba City, CA 95992
Name	Street Address	City & State

95 003865

Exhibit "A"

That certain real property situate in the county of Colusa, state of California described as follows:

Lots 43 and 44 in Sections 28 and 29, in Township 14 North Range 5 West, M.D.B. & M.

Excepting therefrom all oil, gas, minerals and other hydrocarbons, etc., as reserved in deed from Wells Fargo Bank N.A., as Trustees of the Emma G. Trebilcot Trust to Goshute Corporation, recorded February 28, 1990, Book 649 Official Records, page 109.

Exhibit 9

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

Declaration of Richard J. Wallace

I, Richard J. Wallace, declare:

1. I am an attorney licensed to practice law in the State of California. I have personal knowledge of the following facts, and if called as a witness I could and would competently testify to them under oath.

2. I currently practice law with Briscoe Ivester & Bazel LLP. Before joining the firm in 2007, I was in-house counsel with the Legal Department of Old Republic Title Company, formerly Founders Title Company. I was employed with Old Republic's Legal Department for

over fifteen years, from 1991 to 2007. During the last four years of my employment, from 2003 to 2007, I was Regional Counsel and Senior Vice President of Old Republic. In those capacities, I knew the title industry's underwriting criteria and practices from before 1991 until I left the employ of Old Republic in 2007.

3. I have reviewed recorded documents in the chain of title for the land in Colusa County, California that Robert Leal acquired on February 28, 1990, which included land within the parcel that was identified as Assessor Parcel Number 018-200-003 ("Parcel 3"). Robert Leal acquired the property by the Corporation Grant Deed that was recorded on that date at Book 649, Page 118 of the Colusa County Records. The deed vested the property in Robert Leal as "a married man, as his sole and separate property". The property included the land that is now identified as Parcel 10, but not what is now Parcels 11 and 12.

4. The documents that I reviewed include the following three recorded deeds from Jill Leal to Robert Leal: (1) Individual Quitclaim Deed recorded on October 10, 1991 at Book 697, Page 138 of the Colusa County Records ("the 1991 Deed"); (2) Interspousal Transfer Grant Deed recorded on May 20, 1993 at Book 738, Page 825 of the Colusa County Records ("the 1993 Deed"); and (3) Grant Deed recorded on October 16, 1995 as Instrument Number 95-003865 in the Colusa County Records ("the 1995 Deed"). The description in the 1991 Deed included land within Parcel 3, including the Wide Awake Mine site that is now identified as Parcel 10. The description in the1993 Deed did not include Parcel 10. The description in the 1995 Deed described Parcel 10 only. The recording information on all three deeds indicates that each of them was recorded at the request of a title company. The deeds were recorded in connection with Robert Leal's separate transactions concerning the respective properties.

5. At the time of each deed, it was title industry practice to require a spousal deed from the non-titled spouse in any transaction concerning the property of a married individual who owned the subject property as his or her sole and separate property. A deed from the non-titled spouse was not an indication that the spouse owned any interest in the property. Instead, the deed was the title companies' way to ensure that the "community" had not acquired any interest in the property under California community property laws.

6. The three deeds from Jill Leal to Robert Leal were consistent with title industry practice to require the deeds in connection with Robert Leal's transactions solely to confirm that the community had no interest in the respective properties. The 1991 Deed was in the form of a quitclaim deed, which by its very nature does not connote that Jill Leal had any interest in the property that was described in the deed. The 1993 Deed and the 1995 Deed each contained the standard recital, unique to spousal deeds, confirming that the deeds were recorded for the purpose of establishing that Jill Leal had no interest, "community" or otherwise, in the described properties.

I declare under penalty of perjury that the statements made in this declaration are true and correct as to my own knowledge, and that this declaration was executed on July 1, 2009 at San Francisco, California.

Richard Wallace

Exhibit 10

Delta Tributaries Mercury Council (DTMC)

History

The Delta Tributaries Mercury Council (DTMC) has its origins in the Cache Creek Stakeholders Group which was initiated in 1995 in response to Cache Creek's status as an impaired stream due in large part to high mercury concentration. Prior monitoring had indicated very high mercury levels in lower reaches of Cache Creek and the Yolo Bypass which were carried downstream into the Delta and on to San Francisco Bay. In late 1995 the State Water Resources Control Board and the Central Valley Regional Water Quality Control Board were approached by the Colorado Center for Environmental Management with a proposal to initiate and facilitate a collaborative process to consider and help resolve some of the local problems of flood control and mine-impacted pollution in Cache Creek. A two year funding commitment for the program was provided by the Hewlett Foundation and USEPA. The first Stakeholder meeting was held in October 1996 and approximately 50 persons representing federal, state, county agencies and citizen organizations attended. Meetings were held approximately every 6 weeks thereafter. Speakers were invited to address the meetings on substantive issues and subcommittees were formed to investigate and report on relevant topics.

After 2 years the Cache Creek Stakeholders group reorganized, limiting concerns to flood control and related local topics in the Capay Valley. Meanwhile the Mercury Subcommittee had expanded its interests and activities to cover the whole Sacramento watershed area including Clear Lake and the Delta. Monitoring had indicated widespread mercury pollution and it seemed expedient for the Mercury Subcommittee to join forces with other groups and agencies interested in determining its origin and remediation. In June 1999 the Delta Tributaries Mercury Council was formed to expedite monitoring, determination of sites of mercury transformation and bioaccumulation and to assist in the establishment of mercury TMDLs in these regions.

In order to coordinate the activities dealing with mercury pollution in Northern California the Mercury Council in October 1999 voted to approve development of a website with funding for the first year to be provided by the Sacramento River Watershed Program and the U.S.EPA.

Draft Planning and Operating Document of the DTMC

Vision

To reduce mercury in fish and wildlife in the Delta and its tributaries to levels that no longer pose a human health or environmental hazard while promoting the long-term social and economic vitality of the region.

Mission

To bring together scientists, regulators, landowners, resources managers and users, to collaboratively develop and implement a strategic plan for the management of mercury in the Delta and its tributaries and monitor its effectiveness.

Objectives

The diverse stakeholders interested in and impacted by mercury contamination in the Delta and its tributaries have organized to create a forum 1) for outreach, education, and exchange of scientific data; 2) to identify opportunities to improve public policy on mercury management; and 3) to act as a sounding board for ideas. The group will promote, evaluate, critique integrate and actively participate in carrying out the following objectives:

- **Develop Goals and Targets**. Identify, evaluate and recommend water quality goals and targets for mercury that are protective of human health and the environment (e.g. TMDL's, fish advisories, etc.)
- **Develop Models**. Develop methods to evaluate remedial options and help to understand transport and fate of mercury and its compounds within the Sacramento/San Joaquin River Watershed system (Conceptual and analytical models).
- **Identify Sources Fate and Impact**. Identify and evaluate source releases, distribution, transformation (e.g. methylation and demethylation) and uptake of mercury throughout the system and its impact on human health and the environment.
- **Identify Control Measures**. Identify, develop and evaluate the effectiveness of remedial methods for modifying the release, distribution, transformation and uptake of mercury.
- **Develop Strategic Plan**. Develop a plan to reduce relevant environmental mercury levels to meet identified goals and targets and reduce the bioaccumulation and biomagnification of mercury. (You can view the plan here)
- **Implement Strategic Plan.** Implement the strategic plan, including monitoring to track its effective-ness and a feedback loop to revise the plan as new information becomes available.

The objectives established by the Delta Tributaries Mercury Council are not chronological. They will be developed through a parallel and collaborative process. DTMC member organizations are responsible for implementing the objectives, not the group as a whole.

Geographic Area of Focus

The scope of the group focuses on the Delta and its tributaries. Cache Creek was originally selected as a "pilot project" (see Bay Protection Cleanup Plan for justification) Study and implementation started there and has expanded to include other mercury enriched waterbodies in the Sacramento and San Joaquin watersheds.

Membership

The Delta Tributaries Mercury Council strives to be a diverse and inclusive group open to all interested parties. As such it does not limit membership. Stakeholder delegates have not been designated. A balance of representation in decision making depends on active participation from a variety of perspectives at regular meetings. A core group of participants have been active and consistent contributors to the group process. Participants in each meeting are listed in the minutes. A listing of various organizations and agencies participating in the DTMC follows at the end of this section

Decision Making

DTMC members will work towards reaching "consensus" on the issues addressed. Unless notified via email, all decisions will be made at the full DTMC meetings by those members present. The group will work through decisions, adopting one of the following levels of consensus as often as possible:

- **Level I**. Everyone strongly supports the agreement.
- **Level II**. Everyone can "live with" the outcome, though aspects of it may not be their first choice.
- **Level III**. Everyone agrees to move forward despite remaining concerns.

Members agree to actively participate in decision making and take responsibility for voicing opposition. Lack of opposition may be interpreted as support for the decision. The "fall back" if consensus cannot be reached will be to require a 75% majority vote for a decision to be adopted by the group. In such cases, individual opinions may be documented if requested.

Meetings

Regular meetings of the DTMC are held approximately every eight weeks. Meeting notices are emailed to all interested individuals. Check here for information on upcoming meetings, or agendas and minutes from past meetings.

Facilitation

The facilitator(s) serve at the will of the DTMC members. Facilitator(s) will seek to guide the discussions in a balanced and fair manner. Facilitators will guide members in discussions in a manner that keeps

them focused, respectful, and within time limits agreed to in agendas.

Ground Rules

Members agree to follow and enforce with each other these ground rules. Alterations to the ground rules can be made at the full DTMC meetings.

- Respect start and end times
- Keep discussion focused
- Give everyone a chance to speak
- Be brief and to-the-point
- Don't dominate the conversation
- Don't interrupt
- No side conversations
- Share all relevant information
- Everyone participate actively
- Disagree openly

Document Review Process

The DTMC will review documents relevant to their mission as requested. Documents should be submitted in electronic form at least two weeks prior to a full DTMC meeting for discussion at the meeting. The Documents will not be a product of the DTMC. Individual review of relevant information may also be sought from the DTMC members via email.

Organizations and Agencies Represented in the DTMC

- Cache Creek Conservancy
- Cal EPA
- CALFED Bay-Delta Program
- Calif. Department of Conservation, Mines and Geology
- Calif. Department of Fish and Game
- Calif. Department of Water Resources Conservation
- Calif. State University, Chico
- Calif. State Water Resources Control Board (SWRCB)
- Central Valley Regional Water Quality Control Board (CVRWQCB)
- City of Sacramento
- County of Sacramento
- Electric Power Research Institute
- G Fred Lee & Associates
- Homestake Mining Company
- Larry Walker Associates
- MFG, Inc
- Sacramento Regional County Sanitation District
- San Francisco Bay Regional Water Quality Control Board (SFBRWQCB)
- SFEI
- Tetra Tech EM
- U.C. Davis, Department of Environmental Science & Policy
- U.C. Davis, Dept. of Wildlife, Fish and Game
- U.S. Army Corp. of Engineers
- U.S. Bureau of Land Management
- U.S. Department of Agriculture, NRCS
- U.S. EPA
- U.S. Fish and Wildlife Service
- U.S. Forest Service
- U.S. Geological Survey (USGS)
- Yolo County Health Department
- Yolo County Planning/Public Works

Contact

Stephen A. McCord, Ph.D., P.E.
Senior Engineer
Larry Walker Associates
707 Fourth Street, Suite 200
Davis, CA 95616

sam@lwa.com

Exhibit 11

CALFED—CACHE CREEK STUDY
Task 5C2: Final Report

FINAL
ENGINEERING EVALUATION AND COST ANALYSIS FOR THE SULPHUR CREEK MINING DISTRICT COLUSA AND LAKE COUNTIES, CALIFORNIA

Prepared by:

Tetra Tech EM Inc.
10670 White Rock Road, Suite 100
Rancho Cordova, California 95670

(916) 852-8300

September 2003

TABLE 3-9

MERCURY, SEDIMENT, AND SULFATE LOADS FROM THE SULPHUR CREEK MINING DISTRICT
(Page 1 of 2)

Location	Total Mercury Load (kg/yr)	Methyl Mercury Load (kg/yr)	Sediment Load (kg/yr)	Sulfate Load (kg/yr)
UPPER CACHE CREEK BASIN				
Upper Bear Creek	0.0015	4.8×10^{-4}	--	--
Bear Creek above the confluence with Cache Creek	0.071to 603	4.8×10^{-4} to 0.16	Up to 2.7×10^{8}	--
Sulphur Creek at Wilbur Springs	0.30 to 39	3.3×10^{-4} to 0.062	--	--
Sulphur Creek Watershed	0.51 to 160	--	--	--
Harley Gulch	0.018 to 2.3	7.3×10^{-5} to 0.004	--	--
Sum of Bear Creek, Sulphur Creek, and Harley Gulch	**0.60 to 765**	**8.8×10^{-4} to 0.23**	**--**	**--**
SPRINGS				
Turkey Run Spring	1.3×10^{-6} to 0.058	--	--	4.5×10^{10} to 1.5×10^{11}
Blank Spring	6.9×10^{-4} to 0.051	--	--	9.1×10^{7} to 3.3×10^{9}
Jones Fountain of Life	0.002 to 0.032	--	--	9.1×10^{7} to 1.8×10^{8}
Elbow	4.0×10^{-4} to 0.004	--	--	up to 9.1×10^{7}
Unnamed	9.8×10^{-4}	--	--	9.1×10^{7} to 1.8×10^{8}
Wilbur	0.014 to 0.062	--	--	1.1×10^{9} to 2.8×10^{9}
Elgin – Main	0.055 to 0.095	--	--	--
Elgin – Orange Tub	4.0×10^{-4}	--	--	4.5×10^{8}
Sum of Load from Springs* **	**0.18 to 0.30**	**--**	**--**	**4.7×10^{10} to 1.6×10^{11}**
MINE SITES				
Abbott Mine	0.8 to 3.5	--	14,000 to 16,300	--
Turkey Run Mine	0.42 to 6.7	--	28,600 to 30,400	--
Sum of Abbott and Turkey Run Mines	**1.22 to 10.2**	**--**	**42,500 to 46,700**	**--**
Central Mine	0.0028 to 0.034	--	480 to 970	--
Empire Mine	0.04 to 0.06	--	270 to 360	--
Manzanita Mine	0.3 to 6.5	--	4,500 to 49,900	--
Cherry Hill Mine	None*	--	None*	--
West End Mine	0.002 to 1.1	--	Up to 1,630	--
Wide Awake Mine	0.02 to 0.44	--	360 to 7,300	--
Sum of Wilbur Springs Area Mines	**0.4 to 8.2****	**--**	**5,700 to 60,100**	**--**

TABLE 3-9

MERCURY, SEDIMENT, AND SULFATE LOADS FROM THE SULPHUR CREEK MINING DISTRICT
(Page 2 of 2)

Location	Total Mercury Load (kg/yr)	Methyl Mercury Load (kg/yr)	Sediment Load (kg/yr)	Sulfate Load (kg/yr)
MINE SITES (continued)				
Elgin Mine	3.9 to 9.3	--	16,400 to 28,300	--
Clyde Mine	0.036 to 0.076	--	6,100 to 12,400	--
Sum of Upper Sulphur Creek Mines	**3.94 to 9.4**	--	79,100 to 263,700	--
Rathburn – Petray Mines	1.1 to 24.3*	--	8,400 to 116,100*	--
Sum of Bear Creek Mines	**1.1 to 24.3***	--	**8,400 to 116,100***	--
BACKGROUND				
Abbott and Turkey Run Site	0.078 to 0.24	--	--	--
Immediate Area of Sulphur Creek Mines	0.34 to 57	--	--	--

Notes:

*	=	Material released from the site is not known to reach Sulphur or Bear creeks at this point.
**	=	Mercury release from Sulphur Creek bank erosion is uncertain
***	=	Aqueous mercury only, does not include precipitate bound mercury
--	=	Not calculated or not reported
kg/yr	=	Kilogram per year

Sources: Upper Cache Creek Basin: Domagalski and Alpers 2001
Springs: Goff and others 2001
Mine Sites and Background: Churchill and Clinkenbeard 2002

Exhibit 12

Mercury in San Francisco Bay

Total Maximum Daily Load (TMDL)
Proposed Basin Plan Amendment
and Staff Report

Richard Looker / Bill Johnson

California Regional Water Quality Control Board
San Francisco Bay Region

September 2, 2004

TABLE 4.7: Examples of Bay Margin Sites with Elevated Mercury Concentrations

Site	Average Mercury Concentration (ppm)	Estimated Mercury Mass (kg)
Treasure Island Air Station – Area B	0.62	4.8
Treasure Island Air Station – Area E	0.51	1.0
Hamilton Army Air Field	0.6	3.0
U.C. Berkeley Richmond Field Station	16	130
Zeneca – Stege Marsh	5.2	22
Alameda Seaplane Lagoon	1.0	36
Castro Cove	2.3	4.4
Point Potrero	4.7	3.1
Pacific Dry Dock	1.3	*NA*
San Leandro Bay	0.77	3.0
San Francisco International Airport	1.9	*NA*

Source: URS 2002
NA = not available

threshold represent some of the most contaminated bay margin sites. Table 4.7 estimates the mass of mercury at each site (URS 2002). The extent to which this mercury enters San Francisco Bay and affects beneficial uses or influences mercury concentrations in the bay is unknown. However, the margin of safety discussed in Section 7, Allocations, is intended to account for this uncertainty. Moreover, Section 8, Implementation Plan, includes measures to investigate and address potential mercury effects from bay margin contaminated sites.

Key Points

- About 1,220 kg of mercury enters San Francisco Bay each year.
- The sources of mercury in San Francisco Bay include bed erosion (about 460 kg/yr), the Central Valley watershed (about 440 kg/yr), urban storm water runoff (about 160 kg/yr), the Guadalupe River watershed (about 92 kg/yr), direct atmospheric deposition (about 27 kg/yr), non-urban storm water runoff (about 25 kg/yr), and wastewater discharges (about 20 kg/yr).
- San Francisco Bay loses mercury as sediment is transported to the ocean through the Golden Gate (about 1,400 kg/yr), mercury evaporates from the bay surface (about 190 kg/yr), and dredged material is removed and disposed of (about 150 kg/yr, net).

Exhibit 13

REGIONAL WATER QUALITY CONTROL BOARD,
CENTRAL VALLEY REGION

Sulphur Creek
TMDL for Mercury

Final Staff Report

January 2007

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

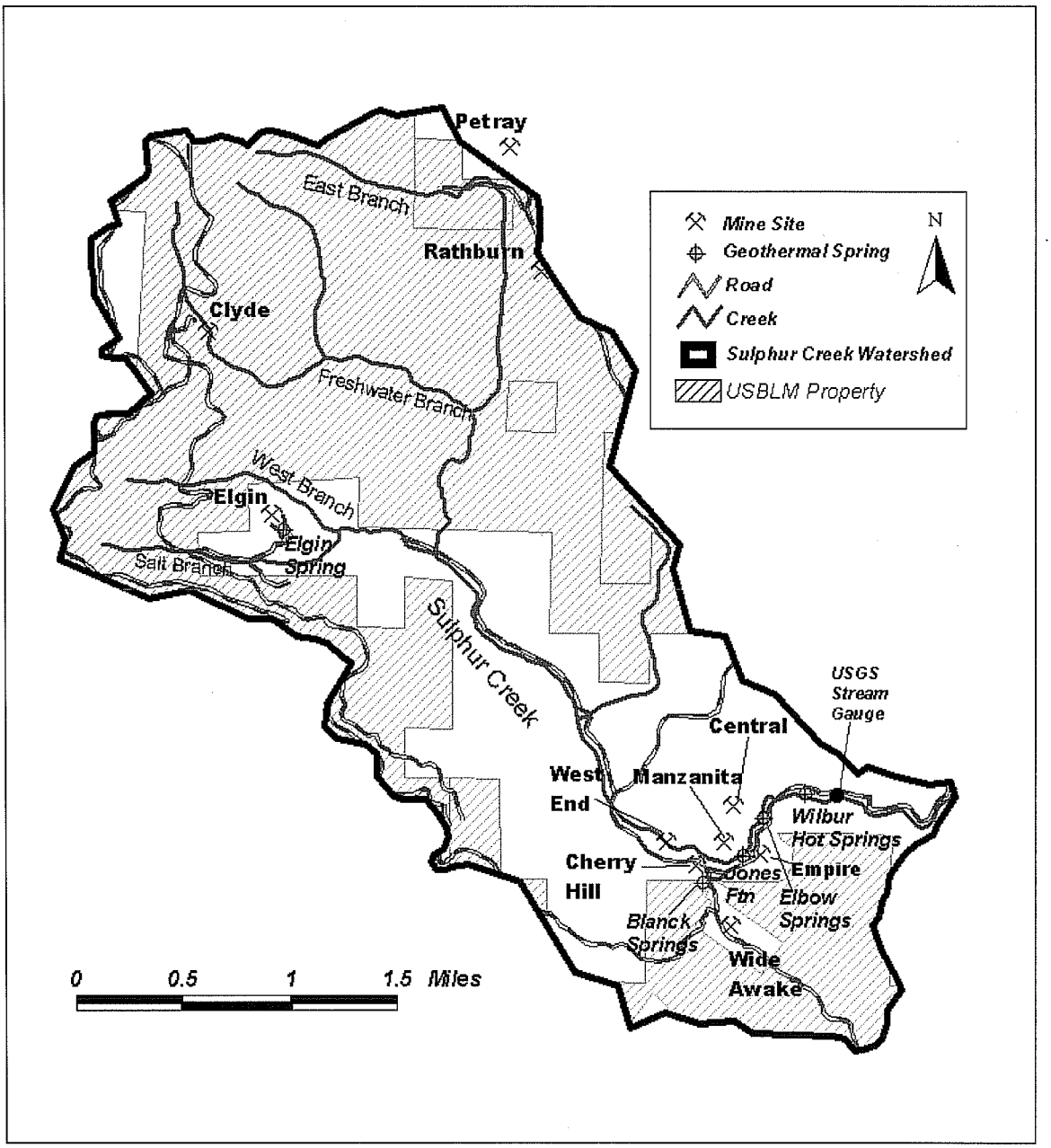


Figure 1.2 Sulphur Creek Watershed

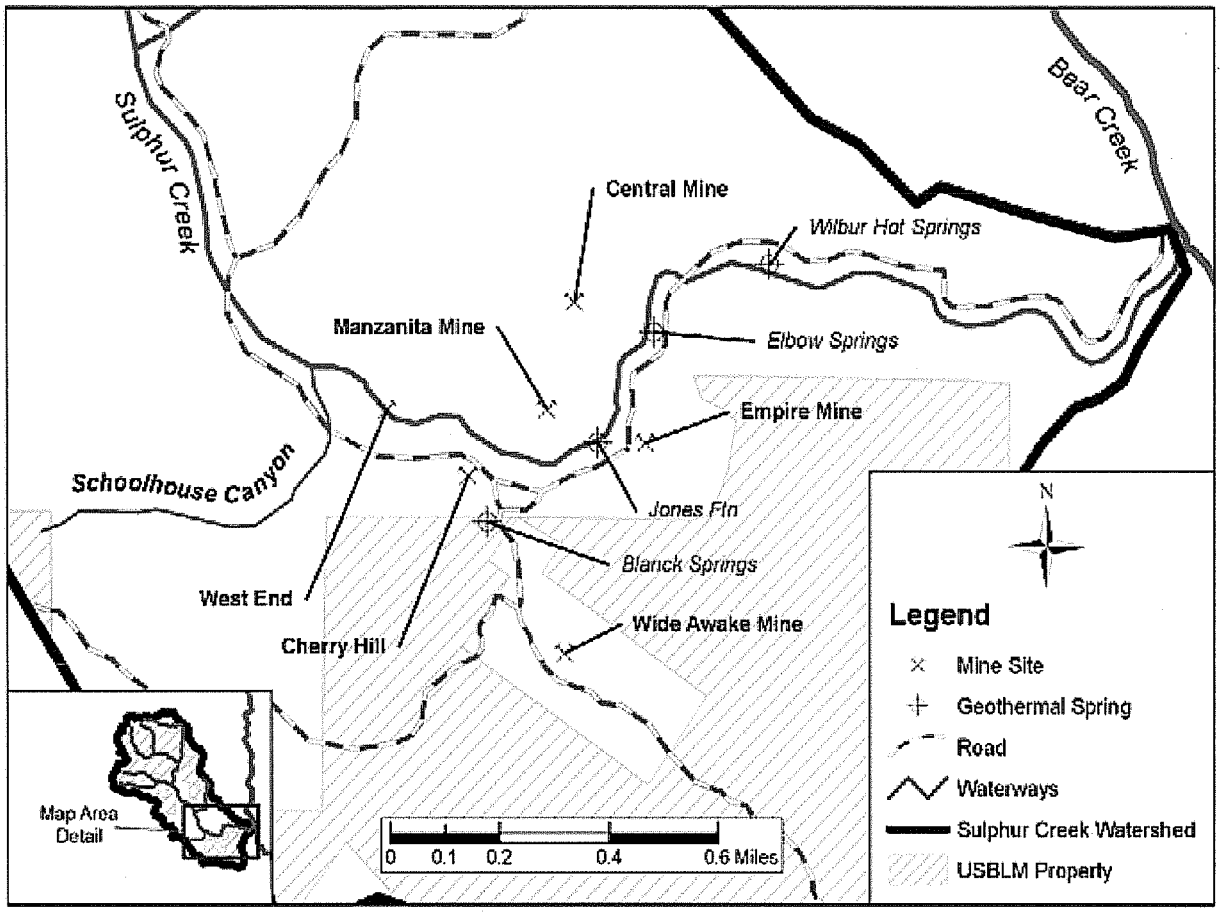


Figure 1.3. Lower Sulphur Creek, from Schoolhouse Canyon to the Mouth.

1.6 Toxicity of Mercury

1.6.1 Mercury Accumulation in Biota

Both inorganic mercury and organic mercury can be taken up from water, sediments, and food by aquatic organisms (Figure 1.3). Because organic mercury uptake rates are generally much greater than rates of elimination, methylmercury concentrates within organisms. Low trophic level species such as phytoplankton obtain most mercury directly from the water. Piscivorous (fish-eating) fish and birds obtain most mercury from contaminated prey rather than directly from the water (USEPA, 1997).

Repeated consumption and accumulation of mercury from contaminated food sources results in tissue concentrations of mercury that are higher in each successive level of the food chain. The proportion of total mercury that exists as the methylated form generally increases with level of the food chain (Nichols *et al.*, 1999). This occurs because inorganic mercury is less well absorbed and more readily eliminated than methylmercury.

Exhibit 14

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
UKIAH DISTRICT OFFICE
555 Leslie Street
Ukiah, California 95482-5599

IN REPLY REFER TO:
CA-27838

NOV 0 5 1992

Memorandum

To: Manager, Clear Lake Resource Area

From: District Geologist

Subject: Property Examination of Robert Leal and Marilyn Kerwin Properties.

On Thursday November 5, 1992 Alice Vigil, Clear Lake Resource Area Realty Specialist, and I examined the Robert Leal and Marilyn Kerwin properties at Walker Ridge in an area on either side of Highway 20. The Leal property, north of the highway is predominately oak grass lands. The Wide Awake (Buckeye) Mine is located on this property at T.14 N., R.5 W., Section 29 SE¼. The Buckeye workings were 600 feet northwest of the Wide Awake shaft on a deposit in serpentine adjoining a shale contact. These workings were largely superficial and produced a reported total of 6000 flasks of mercury, to a depth of 80 feet beginning in 1875. The Wide Awake Mine apparently operated from 1896 to 1900. According to an article by C.A. Logan of 1929 in the California Division of Mines, 25th No. 3, Report to the State Mineralogist, this mine was developed by a 470 foot shaft with development headings on the 190, 290, and 390 foot levels. Apparently little ore was mined and treated from this mine.

On the 290 foot level, a seepage of heavy paraffin-base oil was cut in 1900. This yielded oil at the rate of one-half barrel every 24 hours. During the period of 1896 to 1900 a Scott furnace of 24 tons capacity was built and a small amount of production made a few flasks of mercury. During the earthquake of 1906 this furnace was cracked according to Logan (1929).

Today the large brick furnace still remains on the mine site along with an extensive system of stone walls. The furnace is cracked but has withstood the rigors of time. Also at the mine site there are the ruins of possibly three other brick furnaces. There is a fenced in area that appears to have been the location of a house or housing for the miners. The shaft of the Wide Awake Mine has been filled in a[illegible] its exact location is not evident. S[illegible]veral hundred feet north of the large brick furnace is a mine waste dump with a tipple, furnace, and metal retort. This appears to be newer than

the large brick Scott furnace.

The danger of there being large amounts of hazardous mercury at this site is probably minor. The waste rock from the mine and furnace on the mine dump would contain little or no mercury. There might be some mercury found in and around where mercury was removed from the retorts. It would be necessary to determine where these areas are and take soil samples to determine if there is any mercury contamination of the ground.

The rest of the Leal property was examined by driving the existing roads and no other area of possible hazardous material was seen.

The Kerwin property north of Highway 20 was examined by driving the road that goes southwest off of the Walker Ridge road to Highway 20. The property appears to be almost completely underlain by serpentinized rock. No surface disturbance other that the road was observed and no hazardous material or sites were observed.

Charles W. Whitcomb

A:LEALREPT